
ARTICLE

PROPORTIONALITY AND PAROLE

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Commentators analyzing the Supreme Court’s watershed decision in Graham v. Florida, which prohibited sentences of life without parole for juveniles convicted of nonhomicide crimes, have generally done so in substantive proportionality terms, ignoring or downplaying parole in the process. This Article challenges that approach, focusing on the intersection of proportionality and parole as a jumping-off point. Taking parole seriously makes clear that Graham is difficult to understand solely in terms of substantive proportionality concepts like individual culpability and punishment severity. Instead, the decision can be seen as establishing a rule of constitutional criminal procedure, one that links the validity of punishment to the institutional structure of sentencing. By requiring the State to revisit its first-order sentencing judgments at a later point in time, Graham mandates a procedural space for granular, individualized, and ultimately more reliable sentencing determinations. I expose this procedural and institutional side of parole’s constitutional significance, situate it within the constitutional landscape of sentencing, and sketch some of its implications for the future of sentencing regulation.

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INTRODUCTION

When the Supreme Court in *Graham v. Florida* prohibited sentencing juvenile nonhomicide offenders to life in prison without the possibility of parole,¹ commentators hailed the case as a watershed decision.² Eighth Amendment proportionality challenges to sentences of imprisonment, long viewed as dead,³ had been resurrected. Legal scholars have showered attention on *Graham* in the two years since it was decided.⁴ But despite an ever-expanding literature, the significance of parole to the decision remains almost entirely unexplored.⁵

¹ 130 S. Ct. 2011, 2034 (2010).

² See, e.g., John “Evan” Gibbs, *Jurisprudential Juxtaposition: Application of Graham v. Florida to Adult Sentences*, 38 FLA. ST. U. L. REV. 957, 957 (2011) (characterizing *Graham* as a “landmark decision” that “breathed new life” into proportionality analysis); Scott R. Hechinger, *Juvenile Life Without Parole: An Antidote to Congress’s One-Way Criminal Law Ratchet?*, 35 N.Y.U. REV. L. & SOC. CHANGE 408, 409-10 (2011) (“The decision is unquestionably landmark . . .”); Michael M. O’Hear, *The Beginning of the End for Life Without Parole?*, 23 FED. SENT’G REP. 1, 1-2 (2010) (noting the large volume of expert commentary on *Graham* within five months of the decision and that “*Graham* adopted a new methodology for reviewing Eighth Amendment challenges to noncapital sentences”).

³ Before *Graham*, outside of the capital punishment context, “the Court . . . treated the proportionality requirement as so undemanding as to be nearly meaningless.” O’Hear, *supra* note 2, at 2; see also John D. Castiglione, *Qualitative and Quantitative Proportionality: A Specific Critique of Retributivism*, 71 OHIO ST. L.J. 71, 80 (2010) (“It is time . . . to pronounce the body of Eighth Amendment quantitative proportionality dead . . .”).

⁴ See, e.g., Neelum Arya, *Using Graham v. Florida to Challenge Juvenile Transfer Laws*, 71 LA. L. REV. 99 (2010); Rachel E. Barkow, *Categorizing Graham*, 23 FED. SENT’G REP. 49 (2010); Mary Berkheiser, *Death Is Not So Different After All: Graham v. Florida and the Court’s “Kids Are Different” Eighth Amendment Jurisprudence*, 36 VT. L. REV. 1 (2011); William W. Berry III, *More Different Than Life, Less Different Than Death: The Argument for According Life Without Parole Its Own Category of Heightened Review Under the Eighth Amendment After Graham v. Florida*, 71 OHIO ST. L.J. 1109 (2010); Tamar R. Birkhead, *Graham v. Florida: Justice Kennedy’s Vision of Childhood and the Role of Judges*, 6 DUKE J. CONST. L. & PUB. POL’Y 66 (2010); Cara H. Drinan, *Graham on the Ground*, 87 WASH. L. REV. 51 (2012); Richard S. Frase, *Graham’s Good News—And Not*, 23 FED. SENT’G REP. 54 (2010); Gibbs, *supra* note 2; Youngjae Lee, *The Purposes of Punishment Test*, 23 FED. SENT’G REP. 58 (2010); Dan Markel, *May Minors Be Retributively Punished After Panetti (and Graham)?*, 23 FED. SENT’G REP. 62 (2010); Terry A. Maroney, *Adolescent Brain Science After Graham v. Florida*, 86 NOTRE DAME L. REV. 765 (2011); Eva S. Nilsen, *From Harmelin to Graham—Justice Kennedy Stakes Out a Path to Proportional Punishment*, 23 FED. SENT’G REP. 67 (2010); Richard M. Ré, *Can Congress Overturn Graham v. Florida?*, 34 HARV. J.L. & PUB. POL’Y 367 (2010); Alice Ristorph, *Hope, Imprisonment, and the Constitution*, 23 FED.

On one level, this is mystifying. After all, parole was *the* distinguishing factor in *Graham* between a constitutional and unconstitutional life sentence. On another level, it is hardly shocking. Criminal law scholarship has long neglected parole and other “back-end” sentencing mechanisms.⁶ This is due in large part to criminal law theorists’ traditional view of sentencing as an overwhelmingly substantive concern, divorced from questions of procedural or institutional design.⁷

SENT’G REP. 75 (2010); Alison Siegler & Barry Sullivan, “‘Death is Different’ No Longer”: *Graham v. Florida and the Future of Eighth Amendment Challenges*, 2010 SUP. CT. REV. 327; Carol S. Steiker & Jordan M. Steiker, *Graham Lets the Sun Shine In: The Supreme Court Opens a Window Between Two Formerly Walled-Off Approaches to Eighth Amendment Proportionality Challenges*, 23 FED. SENT’G REP. 79 (2010); *The Supreme Court, 2009 Term—Leading Cases*, 124 HARV. L. REV. 179, 209, 215-19 (2010); Leslie Patrice Wallace, “And I Don’t Know Why It Is That You Threw Your Life Away”: *Abolishing Life Without Parole, The Supreme Court in Graham v. Florida Now Requires States to Give Juveniles Hope for a Second Chance*, 20 B.U. PUB. INT. L.J. 35 (2010); Robert Smith & G. Ben Cohen, *Redemption Song: Graham v. Florida and the Evolving Eighth Amendment Jurisprudence*, 108 MICH. L. REV. FIRST IMPRESSIONS 86 (2010), <http://www.michiganlawreview.org/assets/fi/108/smithcohen.pdf>.

⁵ Alice Ristroph is the only scholar to have touched on the issue, and she has done so only briefly. See Ristroph, *supra* note 4, at 76 (addressing the potential relevance of parole ineligibility to punishment severity under the Eighth Amendment). For a review and critique of Ristroph’s discussion, see *infra* notes 87-94 and accompanying text.

⁶ See Laura I. Appleman, *Retributive Justice and Hidden Sentencing*, 68 OHIO ST. L.J. 1307, 1307 (2007) (“Largely concealed from the public eye, components of hidden sentencing such as probation, parole, and post-release supervision have been ignored by both scholars and policy-makers.”); Jeremy Travis & Kirsten Christiansen, *Failed Reentry: The Challenges of Back-End Sentencing*, 13 GEO. J. ON POVERTY L. & POL’Y 249, 249-50 (2006) (noting that back-end sentencing “has largely escaped the attention of scholars, advocates, legislators and analysts”). Recent and insightful exceptions can be found in the work of David Ball, Steven Chanenson, and Michael O’Hear. See W. David Ball, *Heinous, Atrocious, and Cruel: Apprendi, Indeterminate Sentences, and the Meaning of Punishment*, 109 COLUM. L. REV. 893 (2009) [hereinafter Ball, *Heinous, Atrocious, and Cruel*]; W. David Ball, *Normative Elements of Parole Risk*, 22 STAN. L. & POL’Y REV. 395 (2011) [hereinafter Ball, *Normative Elements*]; Steven L. Chanenson, *Guidance from Above and Beyond*, 58 STAN. L. REV. 175, 186-89 (2005) [hereinafter Chanenson, *Guidance from Above*]; Steven L. Chanenson, *The Next Era of Sentencing Reform*, 54 EMORY L.J. 377, 432-40 (2005) [hereinafter Chanenson, *The Next Era*]; Michael M. O’Hear, *Beyond Rehabilitation: A New Theory of Indeterminate Sentencing*, 48 AM. CRIM. L. REV. 1247 (2011).

⁷ See, e.g., Douglas A. Berman & Stephanos Bibas, *Making Sentencing Sensible*, 4 OHIO ST. J. CRIM. L. 37, 40 (2006) (noting that “structural and procedural principles for sentencing have rarely received sustained attention”). A noteworthy exception to this is the explosion of recent scholarship on the implications of *Apprendi v. New Jersey*, 530 U.S. 466 (2000), for the institutional design of sentencing. See, e.g., Ball, *Heinous, Atrocious, and Cruel*, *supra* note 6; Stephanos Bibas, *How Apprendi Affects Institutional Allocations of Power*, 87 IOWA L. REV. 465 (2002); Jonathan F. Mitchell, *Apprendi’s Domain*, 2006 SUP. CT. REV. 297; Douglas A. Berman, *Should Juries Be the Guide for Adventures Through Apprendi-Land?*, 109 COLUM. L. REV. SIDEBAR 65 (2009), http://www.columbialawreview.org/Sidebar/volume/109/65_Berman.pdf.

Sentencing has largely been treated as a static, unitary act of punishment, the validity of which can be judged at the moment the sentencing gavel falls. Because courts and academics widely view Eighth Amendment proportionality as a substantive sentencing principle, these same tendencies—the tendency to evaluate sentences at a single slice in time, and by reference to familiar substantive debates about culpability, punishment severity, and how well a sentence deters, incapacitates, rehabilitates, and delivers retribution—dominate doctrine and scholarship in that area as well. Commentators, taking their cues from the Court, have thus seen *Graham* as an extension of the substantive proportionality principles of cases like *Roper v. Simmons*⁸ and *Atkins v. Virginia*.⁹ They have analyzed *Graham* as a substantive rule, ignoring or downplaying parole in the process.¹⁰

This Article challenges that approach, focusing on the parole-proportionality intersection as a jumping-off point. Doing so is fruitful because, as this Article shows, the intersection of parole and proportionality strikes at the heart of the larger substance-procedure divide that infects sentencing law generally. By substance-procedure divide, I mean the divide between questions concerning the “what” and “why” of sentences (what sentence may be imposed, and why), on the one hand, and questions concerning the “how” and “who” of sentences (how do we make sentencing decisions, and who sentences), on the other. The former concerns the substantive results of sentences; the latter concerns the procedural rules that govern sentencing. Taking parole seriously makes clear that *Graham* cannot be understood solely—or even primarily—as a purely substantive limit on punishment, concerned only with the question of “what.” Instead, it makes sense to see *Graham* as equally concerned with the question of “how.” The decision establishes a rule of constitutional criminal procedure, one that links the validity of punishment to the institutional structure of sentencing. By requiring the State to revisit its first-order sentencing judgments at a later point in time, *Graham* mandates a procedural space for granular, textured, and ultimately more reliable sentencing determinations. In doing so, it underscores the importance of institutional design to

⁸ 543 U.S. 551 (2005).

⁹ 536 U.S. 304 (2002).

¹⁰ See sources cited *supra* note 4. Indeed, not one sustained examination of the role of parole in *Graham* exists in an entire *Federal Sentencing Reporter* issue devoted to the *Graham* decision. See generally *Life Without Parole*, 23 FED. SENT’G REP. 1 (2010).

the constitutional regulation of punishment beyond the Sixth Amendment context of *Apprendi v. New Jersey*.¹¹

The remainder of this Article proceeds in three Parts. Part I sets out parole's puzzle for proportionality and explains the limits of viewing *Graham*—and the Eighth Amendment significance of parole—through a classic proportionality lens. Part II explores the overlooked procedural and institutional side of *Graham*. It shows how the interaction of substance and procedure that drives the constitutional significance of parole makes *Graham* more the cousin of *Woodson v. North Carolina*,¹² *Lockett v. Ohio*,¹³ and other “super due process for death” cases than that of *Roper*, *Atkins*, and other proportionality cases. Like *Graham*, and unlike *Roper* and *Atkins*, those cases do not foreclose any actual punishment; rather, they aim at morally reliable sentences by laying down a procedural requirement of individualized, textured sentencing, roughly analogous to how parole functions in *Graham*. Part III sketches some implications of this account. Recognizing parole's procedural significance illuminates how *Graham* continues *Apprendi*'s project of linking institutional design to punishment legitimacy, breaks down traditional barriers within sentencing, and lays the foundation for the increased importance of sentencing explanations at the back end of the sentencing process.

I. PAROLE AND PROPORTIONALITY

Parole presents a puzzle for proportionality. Proportionality eschews any one purpose of punishment and weighs the severity of sentences against the characteristics of the offense and the offender at the time of the offense. Parole turns on notions of rehabilitation and risk-management and involves highly discretionary release decisions based heavily on post-offense developments. This Part shows how mixing the two scrambles conventional proportionality principles for concepts like culpability and punishment severity. Section I.A provides a brief definitional, historical, and constitutional context of parole. Using

¹¹ See 530 U.S. 466, 490 (2000) (holding that the Sixth Amendment requires any fact other than the fact of a prior conviction that increases a sentence beyond the prescribed statutory maximum to be presented to a jury and proved beyond a reasonable doubt).

¹² 428 U.S. 280 (1976) (plurality opinion).

¹³ 438 U.S. 586 (1978) (plurality opinion).

Graham as a foil, Section I.B explores the difficulties with trying to fit the constitutional significance of parole into the proportionality box.

A. Parole in Context

“Parole” has multiple meanings, but I use it here in a particular way—as did the Court in *Graham*—as referring to a discretionary early release decision, made by a parole board or similar authority, based upon its review of an individual prisoner’s circumstances.¹⁴ When American criminal justice reformers introduced this vision of parole over a century ago, rehabilitation was the dominant approach to sentencing and corrections.¹⁵ In the indeterminate sentencing regimes of the time, parole boards—which were then and still are largely executive branch agencies—were critical institutional players in determining a sentence’s length.¹⁶ They did so by deciding on a case-by-case basis whether and when each individual offender was ready to be returned to the community.¹⁷ The factors governing those decisions were broad and varied and involved a wide range of both forward- and backward-looking considerations. They included things like the offender’s participation in prison programs; infractions of prison rules; job opportunities upon release; family ties; the seriousness of the original offense; expressions of remorse and repentance; the risk of recidivism; and the

¹⁴ Parole can also mean mandatory release, although I do not use the term that way in this Article. Between 1976 and 1999, the fraction of parole releases that were discretionary fell from sixty-five percent to twenty-four percent; in other words, more than three-quarters of parole releases are now automatic by operation of law. JEREMY TRAVIS & SARAH LAWRENCE, *BEYOND THE PRISON GATES: THE STATE OF PAROLE IN AMERICA* 4-5 (2002). Yet due to the explosion in size of the modern prison population, the absolute number of discretionary releases actually increased during that same period. *Id.* at 5. Whether release is discretionary or mandatory, parole also can refer to an offender’s status as having been released and being under parole supervision—i.e., being “paroled” or “on parole.” Again, I do not use the term that way in this Article.

¹⁵ See Daniel Weiss, *California’s Inequitable Parole System: A Proposal to Reestablish Fairness*, 78 S. CAL. L. REV. 1573, 1584 (2005) (“Historically, the rehabilitation and reintegration of the parolee into society were the goals of the parole system.”).

¹⁶ See TRAVIS & LAWRENCE, *supra* note 14, at 4 (contrasting discretionary release systems that use parole boards with mandatory release systems in which legal rules govern release); Michael Tonry, *Obsolescence and Immanence in Penal Theory and Policy*, 105 COLUM. L. REV. 1233, 1234 (2005) (noting parole boards’ historic “broad or plenary authority to release prisoners, subject, usually, only to the maximum prison term set by the judge or the legislature”).

¹⁷ See TRAVIS & LAWRENCE, *supra* note 14, at 2 (discussing individualized nature of parole release decisions); Victoria J. Palacios, *Go and Sin No More: Rationality and Release Decisions by Parole Boards*, 45 S.C. L. REV. 567, 578-79 (1994) (comparing a parole board’s discretion to that of a judge in sentencing).

views of victims, community members, prosecutors, or sentencing judges.¹⁸

Parole fell from favor as sentencing discretion came under attack in the 1970s, determinate sentencing systems replaced indeterminate ones, and retribution replaced rehabilitation as a favored aim of punishment.¹⁹ Modern day parole boards began to focus their release decisions more on managing dangerousness than anything else.²⁰ But even then, the individualized, contextual, and ultimately normative nature of the inquiry remained the same, with most boards continuing to consider some mix of the sorts of factors just described.²¹

¹⁸ See, e.g., DON M. GOTTFREDSON ET AL., GUIDELINES FOR PAROLE AND SENTENCING: A POLICY CONTROL METHOD 8, 23 (1978); TRAVIS & LAWRENCE, *supra* note 14, at 26 n.16; Julian V. Roberts, *Listening to the Crime Victim: Evaluating Victim Input at Sentencing and Parole*, in 38 CRIME AND JUSTICE: A REVIEW OF RESEARCH 347, 399 (Michael Tonry ed., 2009); Bryan H. Ward, *A Plea Best Not Taken: Why Criminal Defendants Should Avoid the Alford Plea*, 68 MO. L. REV. 913, 933 (2003); see also MODEL PENAL CODE § 305.9 (Proposed Official Draft 1962) (listing several post-conviction factors to be considered in parole release determinations, such as “any apparent development in [the prisoner’s] personality which may promote or hinder his conformity to law” and “the prisoner’s conduct in the institution”).

¹⁹ See TRAVIS & LAWRENCE, *supra* note 14, at 2 (“As indeterminate sentencing came under scrutiny in the 1970s, so did parole. . . . As the goal of rehabilitation lost support and the goals of ‘just deserts’ and retribution found new adherents, parole’s mission to support prisoner reintegration was called into question.” (footnote omitted)). The attack on sentencing discretion began in earnest with Judge Marvin Frankel’s famous critique of unbridled discretion as a source of massive and unjust sentencing disparities. MARVIN E. FRANKEL, CRIMINAL SENTENCES: LAW WITHOUT ORDER (1973).

²⁰ See Joshua Stengel, *Parole’s Function, Purpose, and Role in the Criminal Justice System*, NAT’L INST. CORRECTIONS (Aug. 30, 2010, 4:38 PM), <http://community.nicic.gov/blogs/parole/archive/2010/08/30/parole-s-function-purpose-and-role-in-the-criminal-justice-system.aspx> (describing how risk assessment and public safety concerns have begun to dominate release decisions); see also, e.g., *In re Lawrence*, 190 P.3d 535, 549 (Cal. 2008) (“[T]he [California] Penal Code and corresponding regulations establish that the fundamental consideration in parole decisions is public safety Moreover . . . the core determination of ‘public safety’ under the statute and corresponding regulations involves an assessment of an inmate’s *current* dangerousness.” (citations omitted)); *Stewart v. Pa. Bd. of Prob. & Parole*, 714 A.2d 502, 508 (Pa. Commw. Ct. 1998) (“[T]he legislature has sent a message to the Parole Board that public safety is now the paramount issue in parole decision-making.”); *In re Thomas*, 147 Wash. App. 1048, 1049 (2008) (“[The statute] directs the ISRB to give public safety considerations the highest priority when making parole decisions . . .”).

²¹ See, e.g., PAULA M. DITTON & DORIS JAMES WILSON, BUREAU OF JUSTICE STATISTICS, NCJ 17003, TRUTH IN SENTENCING IN STATE PRISONS 4-14 (1999), *available at* <http://bjs.ojp.usdoj.gov/index.cfm?ty=pbdetail&iid=820> (describing how state boards approach parole decisions and listing factors that shape those decisions); Ball, *Normative Elements*, *supra* note 6, at 397-98 (noting that, in California, the information used in parole risk assessments includes things like “the offender’s social history, criminal his-

The deeply discretionary nature of parole release decisions is reflected in a constitutional doctrine that commits parole to the virtually unfettered judgment of the states and their parole boards. Courts view parole decisions as “equity-type” determinations that involve “predictive judgment[s]” about “what is best both for the individual inmate and for the community.”²² They are “discretionary assessment[s] of a multiplicity of imponderables, entailing primarily what a man is and what he may become rather than simply what he has done.”²³ Courts accordingly afford parole only the most anemic procedural due process protections. Parole release decisions require the most minimal opportunity to be heard, the barest statement of reasons, and the weakest evidentiary support on appellate review.²⁴ The upshot, as David Ball puts it, is that “a parole board is free to deny parole for whatever reason, on whatever facts, for however long.”²⁵ There is no

tory, and commitment offense,” and is “centered entirely around the individual prisoner” (citing CAL. CODE REGS. tit. 15, § 2281(b) (2010)); *id.* at 407-08 (observing that “[d]esert entwines itself” in the risk release assessments that go into parole decisions and that “desert is considered not in the abstract—whether this kind of person deserves release—but in the concrete—whether *this particular person* deserves release”); *see also* Miller v. N.Y. State Div. of Parole, 897 N.Y.S.2d 726, 727 (App. Div. 2010) (noting the parole board’s consideration of “the petitioner’s institutional record, including his disciplinary record, program accomplishments, academic achievements, and postrelease living arrangements, as well as the violent circumstances of his crime, his criminal history, and his continued claim of innocence” in making its release decision (citations omitted)). The data and psychiatric and behavioral science that parole boards use to assess these factors have grown much more sophisticated in recent years. *See* Shelley L. Brown et al., *The Dynamic Prediction of Criminal Recidivism: A Three-Wave Prospective Study*, 33 LAW & HUM. BEHAV. 25, 28-29 (2009) (discussing static and dynamic risk factors used to predict criminal recidivism).

²² Bd. of Pardons v. Allen, 482 U.S. 369, 375 (1987) (quoting *Greenholtz v. Inmates of Neb. Penal & Corr. Complex*, 442 U.S. 1, 8 (1979)).

²³ *Greenholtz*, 442 U.S. at 10 (quoting Sanford H. Kadish, *The Advocate and the Expert—Counsel in the Peno-Correctional Process*, 45 MINN. L. REV. 803, 813 (1961)).

²⁴ *See, e.g., id.* at 16 (describing the constitutional requirements of opportunity to be heard and notice of denial); Ball, *Heinous, Atrocious, and Cruel*, *supra* note 6, at 944-50 (reviewing procedural due process constraints on parole decisionmaking). To use David Ball’s words, the Court’s procedural due process cases addressing parole have been “messy” and “underdefined.” *Id.* at 944.

²⁵ Ball, *Heinous, Atrocious, and Cruel*, *supra* note 6, at 944.

enforceable substantive constitutional right to parole release.²⁶ States can grant or deny parole as they see fit.²⁷

B. Parole's Puzzle for Proportionality

It was against this backdrop that the Court decided *Graham*.²⁸ The decision put parole's significance to the constitutional regulation of punishment at center stage. Or at least it should have. Although parole was critical to the outcome, the Court barely discussed it. The Court instead folded parole into its "independent judgment" of disproportionality, which rested on three factors: lack of "legitimate penological justification" for juvenile life without parole,²⁹ juvenile nonhomicide offenders' "limited culpability,"³⁰ and the punishment's "severity."³¹

²⁶ See, e.g., *Hewitt v. Helms*, 459 U.S. 460, 467-68 (1983) ("[T]here is no constitutional or inherent right to parole and the Constitution itself does not guarantee good-time credit for satisfactory behavior while in prison despite the undoubted impact of such credits on the freedom of inmates." (citations omitted) (internal quotation marks omitted)); *Conn. Bd. of Pardons v. Dumschat*, 452 U.S. 458, 464 (1981) (observing that there is no constitutional entitlement to parole).

²⁷ See *Allen*, 482 U.S. at 377 n.8, 378 ("[A] State has no duty to establish a parole system or to provide for parole for all categories of convicted persons, and . . . may place conditions on parole release." (citation omitted)); *Greenholtz*, 442 U.S. at 10 (noting that for discretionary parole release, "there is no set of facts which, if shown, mandate a decision favorable to the individual"). The Court reaffirmed this principle in a recent post-*Graham* decision. See *Swarthout v. Cooke*, 131 S. Ct. 859, 862 (2011) (per curiam) ("There is no right under the Federal Constitution to be conditionally released before the expiration of a valid sentence, and the States are under no duty to offer parole to their prisoners." (citation omitted)). States may, however, create a state law entitlement to parole through state statute or regulation. *Greenholtz*, 442 U.S. at 7-8. Where a state does so, procedural due process protections apply. *Id.* at 7.

²⁸ Terrance Graham had been on probation for earlier crimes that carried a maximum sentence of life imprisonment without possibility of parole when, just thirty-four days shy of his eighteenth birthday, he committed an armed home burglary. *Graham v. Florida*, 130 S. Ct. 2011, 2018 (2010). A Florida trial judge sentenced him to life without parole for the original crimes, and an intermediate state appellate court affirmed, finding that Graham had "rejected his second chance" and that he was incapable of rehabilitation. *Graham v. State*, 982 So. 2d 43, 53 (Fla. Dist. Ct. App. 2008). The Supreme Court reversed, categorically barring sentences of life without parole as disproportionate for all juvenile nonhomicide offenders. *Graham*, 130 S. Ct. at 2034.

²⁹ *Graham*, 130 S. Ct. at 2028.

³⁰ *Id.* at 2030.

³¹ *Id.* I do not mean to dismiss the significance of either the objective prong of *Graham's* proportionality inquiry or its shift in applying the proportionality test from the capital context to the noncapital context—a shift that a prominent commentator has rightly characterized as "monumental." Barkow, *supra* note 4, at 50. But the objective test, without more, merely reflects existing standards—whether they concern life without parole or any other sentencing practice—as expressed in legislative enactments

Each of these—penological justifications, culpability, and severity—is a classic Eighth Amendment proportionality consideration, and in relying on them, the Court hewed closely to the approach it had taken five years earlier in *Roper*.³² By injecting parole into the mix, however, *Graham* scrambled each factor significantly and raised more questions than it answered about how parole and proportionality intersect.

First, take *Graham*'s point about legitimate penological justifications. The “purposes of punishment” test, as this factor has come to be called, is based on the Eighth Amendment's principle of penal agnosticism.³³ Penal agnosticism holds that “the Eighth Amendment does not mandate adoption of any one penological theory”;³⁴ it is, in other words, agnostic with respect to the sentencing practices and punitive goals embodied in state laws. Thus, a sentence is not disproportionate as long as it advances “the goals of penal sanctions that have been recognized as legitimate—retribution, deterrence, incapacitation, and rehabilitation.”³⁵ Over the last few decades, the Court and its individual members have frequently invoked penal agnosticism to uphold what by any standard were extremely harsh sentences,³⁶ including, in *Harmelin*, a life sentence without parole for a first-time felon convicted of possessing 672 grams of cocaine.³⁷

and state practice. See *Graham*, 130 S. Ct. at 2022; see also *Roper v. Simmons*, 543 U.S. 551, 564-68 (2005). It tells us nothing independent about the relationship of parole to substantive proportionality principles.

³² See *Roper*, 543 U.S. at 568, 571; Barkow, *supra* note 4, at 50 (discussing the centrality of *Roper* to *Graham*'s reasoning).

³³ See, e.g., Lee, *supra* note 4, at 58-59 (discussing the “purposes of punishment test” and stating that the Court has resisted commitment to a specific theory of punishment).

³⁴ *Harmelin v. Michigan*, 501 U.S. 957, 999 (1991) (Kennedy, J., concurring in part and concurring in the judgment). As Justice O'Connor observed in *Ewing v. California*, decisions about penological purposes are generally seen as legislative choices to which reviewing courts owe deference, particularly under principles of federalism. See 538 U.S. 11, 25 (2003) (plurality opinion); see also *id.* (“Our traditional deference to legislative policy choices finds a corollary in the principle that the Constitution ‘does not mandate adoption of any one penological theory.’” (quoting *Harmelin*, 501 U.S. at 999 (Kennedy, J., concurring in part and concurring in the judgment))).

³⁵ *Graham*, 130 S. Ct. at 2028 (citing *Ewing*, 538 U.S. at 25).

³⁶ See, e.g., *Ewing*, 538 U.S. at 25-26; *Harmelin*, 501 U.S. at 999 (Kennedy, J., concurring in part and concurring in the judgment); *Rummel v. Estelle*, 445 U.S. 263, 284-85 (1980); see also Carol S. Steiker, Panetti v. Quarterman: *Is There a “Rational Understanding” of the Supreme Court’s Eighth Amendment Jurisprudence?*, 5 OHIO ST.J. CRIM. L. 285, 290 (2007) (“In the [Eighth Amendment] morass . . . one theme has remained consistent: the Court insists that the Constitution is agnostic when it comes to penological purposes. That is, states are free to choose their penal goals and to structure their punitive practices to achieve those goals.”).

³⁷ 501 U.S. at 961.

But, if that is the case, then what is the constitutional problem with eliminating a sentencing practice like parole, even for juvenile non-homicide offenders? Doing so advances at least *some* permissible sentencing goals, including incapacitation and deterrence. It incapacitates by keeping young criminals—a number of whom, empirically, will be recidivists—off the streets.³⁸ It deters by sending an unmistakable message to other potential young offenders—some of whom will be contemplating serious crimes—that there are no second chances.³⁹ The Court has accepted these purposes before as sufficient to uphold what might plausibly be seen as equally harsh sentences, including, for example, a sentence of twenty-five years to life under California’s “three-strikes” law for the theft of three golf clubs in *Ewing v. California*.⁴⁰ *Ewing* stressed that tough recidivist statutes further incapacitation and deterrence and that states are free to choose their sentencing goals.⁴¹ *Rummel v. Estelle* made a similar point when affirming a three-strikes life sentence for passing a bad check for \$120.75.⁴² Framed as a substantive sentencing rule, *Graham* moves away from these cases by placing limits on a state’s pursuit of otherwise valid penological ends.

The conceptual source of those limits, and their relationship to parole, is muddy. The Court glossed over the boundaries of penal agnosticism, noting only that “incapacitation cannot override all other considerations.”⁴³ But it never clearly explained what those other considerations were. The Court’s observation that “life without pa-

³⁸ See *Graham*, 130 S. Ct. at 2053 (Thomas, J., dissenting); Candace Zierdt, *The Little Engine That Arrived at the Wrong Station: How to Get Juvenile Justice Back on the Right Track*, 33 U.S.F.L. REV. 401, 422 (1999).

³⁹ See *Graham*, 130 S. Ct. at 2053-54 (Thomas, J., dissenting); cf. *Roper v. Simmons*, 543 U.S. 551, 621 (2005) (Scalia, J., dissenting) (“The Court’s contention that the goals of retribution and deterrence are not served by executing murderers under 18 is . . . transparently false.”). Eliminating parole might also advance retributive goals, at least under some conceptions of retributivism. Cf. *id.* (similar); Alice Ristroph, *Proportionality as a Principle of Limited Government*, 55 DUKE L.J. 263, 315-16 (2005) (discussing difficulties with disproving the claim that neither prison nor the death penalty serves any retributive purpose for juveniles).

⁴⁰ 538 U.S. at 30.

⁴¹ *Id.* at 25-26.

⁴² 445 U.S. 263, 284-85 (1980); see also *id.* (noting that the purposes of recidivist statutes are deterrence and incapacitation, and that it is “largely within the discretion of the punishing jurisdiction” to determine the length of time for which a recidivist must be isolated from society).

⁴³ *Graham*, 130 S. Ct. at 2029; see also Lee, *supra* note 4, at 59 (observing that “the Court has been trying to avoid engaging with deep philosophical issues about the purposes of punishment and what limitations should be placed on it”).

role . . . improperly denies . . . a chance to demonstrate growth and maturity” did little to illuminate the issue.⁴⁴ Aside from its obvious falsity—even individuals imprisoned for life can still demonstrate growth and maturity, which a number of “lifers” do⁴⁵—the observation is meaningless without a link to some substantive constitutional standard for parole, which has never existed and which *Graham* steadfastly refused to create.⁴⁶

What drove the Court’s decision in the end was its independent judgment on the other two factors, culpability and severity. It was not that incapacitation and deterrence no longer mattered for juveniles. It was that marginally advancing those goals by eliminating parole could not be justified in light of juveniles’ “diminished moral responsibility” and the harshness of the punishment imposed.⁴⁷ *Graham* might thus be seen as part of a trend in recent proportionality decisions—including *Roper*, *Atkins*, *Kennedy v. Louisiana*,⁴⁸ and *Panetti v. Quarterman*⁴⁹—that suggests the ascendancy of retributive limitations on punishment over the Court’s professed agnosticism toward penological purposes.⁵⁰ *Graham*, however, was more of a leap than just

⁴⁴ *Graham*, 130 S. Ct. at 2029.

⁴⁵ See, e.g., Ronald J. Tabak, *How Empirical Studies Can Affect Positively the Politics of the Death Penalty*, 83 CORNELL L. REV. 1431, 1436 n.32 (1998) (“After a few years, lifers become your better prisoners. . . . They tend to be a calming influence on the younger kids, and we have more problems with people serving short terms.” (citation omitted)).

⁴⁶ See *supra* notes 28-31 and accompanying text; *infra* notes 57-59 and accompanying text; see also Ristorph, *supra* note 4, at 76 (observing that the *Graham* Court framed its holding “as a negative right, not a positive one”).

⁴⁷ *Graham*, 130 S. Ct. at 2029.

⁴⁸ See 554 U.S. 407, 413 (2008) (prohibiting imposition of the death penalty for the rape of a child).

⁴⁹ See 551 U.S. 930, 932 (2007) (reaffirming that the Eighth Amendment prohibits the execution of a mentally incompetent offender and establishing standards and procedures for determining competency).

⁵⁰ For helpful discussions in recent Eighth Amendment scholarship of evidence of this trend, see Lee, *supra* note 4, at 58-60, Dan Markel, *Executing Retributivism: Panetti and the Future of the Eighth Amendment*, 103 NW. U. L. REV. 1163, 1212-15, 1213 n.189 (2009), Steiker & Steiker, *supra* note 4, at 79-82, and Steiker, *supra* note 36, at 294-95. See generally Youngjae Lee, *The Constitutional Right Against Excessive Punishment*, 91 VA. L. REV. 677, 737 (2005) (discussing the basic conflict between the purposes of punishment test and retributive limitations on punishment and arguing that “the Eighth Amendment places a limitation on how we may pursue the purposes of punishment”).

Importantly, saying that retributivism trumps penal agnosticism does not render the latter a dead letter. Within retributive constraints, penal agnosticism still rules, and states remain free to design punitive institutions and structure sentencing goals as they see fit. See Kyron Huigens, *On Aristotelian Criminal Law: A Reply to Duff*, 18 NOTRE DAME J.L. ETHICS & PUB. POL’Y 465, 477-78 (2004) (distinguishing between theories and ends of punishment). It may well be that the Court is simultaneously agnostic about the

another step, because it extended that trend beyond the capital context for the first time.

Graham's treatment of culpability and severity likewise upends settled understandings. As just suggested, culpability and severity are the two sides of the retributivist coin: as embodied in the Eighth Amendment, retributivist limitations on punishment prohibit punishing an offender excessively in relation to his culpability. More specifically, they prohibit punishing an offender more severely than other equally or more culpable offenders, whatever purposes doing so might serve.⁵¹ Such "negative" or "limiting" retributivism has become an acknowledged mainstay of the Court's modern proportionality doctrine.⁵² It was the *raison d'être* behind *Roper* and *Atkins's* categorical holdings that juvenile and mentally retarded offenders' diminished culpability rendered death too severe a punishment for their crimes.⁵³ *Graham* relied on it heavily to reach its analogous conclusion for life without parole.⁵⁴

In linking negative retributivism to a requirement of parole, however, the Court did not explain how parole, culpability, and severity interrelate. The answer is far from clear. Classic retributive culpability is static and backward-looking. It is "concerned only with the offend-

ends of punishment a state may pursue, but not agnostic about what is a constitutionally permissible theory of and justification for punishment. *Cf. id.* The Court, however, has yet to draw that distinction or to explain if that is indeed the case.

⁵¹ See *Lee, supra* note 50, at 689-91 (outlining the basic Eighth Amendment approach to retributivism).

⁵² Negative retributivism *prohibits* punishing offenders excessively in relation to their culpability. Positive retributivism, by contrast, *requires* punishing offenders in proportion to their culpability. Negative retributivism can be of two types: noncomparative and comparative. Noncomparative negative retributivism measures excessiveness in absolute terms; an offender cannot be punished more severely than his culpability would warrant, even if all other equally culpable offenders receive the same punishment. Comparative negative retributivism measures excessiveness in relative terms; an offender cannot be punished more severely than other equally or more culpable offenders. I refer only to the comparative variety here, because it is the one most evident in the Court's proportionality jurisprudence and in scholarly treatments of the Eighth Amendment. See *id.* at 714-20 (reviewing comparative negative retributivism in Eighth Amendment cases and highlighting its importance in judicial enforcement of retributivism). For comparisons of negative and positive retributivism, see R.A. DUFF, PUNISHMENT, COMMUNICATION, AND COMMUNITY 11-12 (2001), J.L. Mackie, *Retributivism: A Test Case for Ethical Objectivity*, in *PHILOSOPHY OF LAW* 677, 678 (Joel Feinberg & Hyman Gross eds., 4th ed. 1991), and Markel, *supra* note 50, at 1214-16.

⁵³ See *Roper v. Simmons*, 543 U.S. 551, 568-72 (2005); *Atkins v. Virginia*, 536 U.S. 304, 317-21 (2002).

⁵⁴ See *Graham v. Florida*, 130 S. Ct. 2011, 2026 (2010) (considering "the culpability of the offenders at issue . . . along with the severity of the punishment in question").

er's wrongful act and the circumstances surrounding it"⁵⁵—for example, the harm caused (or wrong committed), and the offender's mental state and conduct at the time of the offense.⁵⁶ Some aspects of *Graham's* culpability analysis—such as its focus on the moral difference between homicide and nonhomicide crimes and juveniles' developmental immaturity and susceptibility to influence—accorded with that conception.⁵⁷ Others did not. The Court, for example, made much of the “transient” character of juveniles and the “greater possibility . . . that a minor's character deficiencies will be reformed.”⁵⁸ Why? Postoffense changes in character, expressions of remorse, or repentance have little to do with harm, mental state, or conduct at the time of the offense. They thus should not matter to classic retributive culpability.⁵⁹

To be sure, they might still matter to some other versions of retributivism, such as character retributivism.⁶⁰ Under that theory, a propensity for change might be relevant to culpability if it could be taken as evidence of a less “hardened” character at the time a crime is

⁵⁵ Stephanos Bibas & Richard A. Bierschbach, *Integrating Remorse and Apology into Criminal Procedure*, 114 YALE L.J. 85, 107 (2004).

⁵⁶ See, e.g., Darryl K. Brown, *Third-Party Interests in Criminal Law*, 80 TEX. L. REV. 1383, 1408 (2002); Dan Markel, *Against Mercy*, 88 MINN. L. REV. 1421, 1445 (2004).

⁵⁷ *Graham*, 130 S. Ct. at 2026-27. Each of these is at least arguably relevant to culpability at the time of the offense.

⁵⁸ *Id.* (quoting *Roper*, 543 U.S. at 570).

⁵⁹ As Stephen Garvey writes,

Retributivism holds that punishment is justified when it is deserved. . . . [R]etributivism is deontological and backward-looking. In contrast to forward-looking consequentialist approaches that justify punishment in the name of what might be, retributivism justifies punishment in the name of what has been. Punishment strictly predicated on moral desert is blind to the future.

Stephen P. Garvey, “*As the Gentle Rain from Heaven*”: *Mercy in Capital Sentencing*, 81 CORNELL L. REV. 989, 1012 (1996); see also Jeffrie G. Murphy, *Repentance, Punishment, and Mercy* (comparing grievance retributivism and character retributivism and explaining that a wrongdoer's repentance should have no effect on the former), in *REPENTANCE: A COMPARATIVE PERSPECTIVE* 143, 149 (Amitai Etzioni & David E. Carney eds., 1997).

⁶⁰ Character retributivism holds that a wrongdoer's culpability is a function not only of his wrongful acts, but also of his character. See Murphy, *supra* note 59, at 149 (explaining that under character retributivism, “one's deserts are a function not merely of one's wrongful act, but also of the ultimate state of one's character”); Carol S. Steiker, *Murphy on Mercy: A Prudential Reconsideration*, CRIM. JUST. ETHICS, Summer/Fall 2008, at 45, 47 (similar); B. Douglas Robbins, Comment, *Resurrection from a Death Sentence: Why Capital Sentences Should Be Commuted upon the Occasion of an Authentic Ethical Transformation*, 149 U. PA. L. REV. 1115, 1123-30 (2001) (discussing features of character retributivism, including the idea that wrongdoers should be punished in proportion to their own inner wickedness).

committed.⁶¹ *Roper's* discussion of juveniles' culpability, on which *Graham* explicitly drew, appears to have had such a notion in mind.⁶²

But if that is the point, then what is the relevance of parole? If less "hardened" juveniles truly are less culpable at the time of the offense than are their nonhomicidal adult counterparts, and if the maximum allowable punishment for the adults is life imprisonment, then proper application of negative retributivism should mean that the juveniles cannot be imprisoned for life. From the standpoint of retributive culpability, a constitutional requirement that we draw out the time frame of sentencing by years or decades does not make much sense. If we know everything we need to know about culpability now, then a parole board does not need to take a second look later on. Life imprisonment for nonhomicidal juveniles, even through repeated denials of parole, should be off the table.⁶³

Unless, that is, the constitutional significance of parole turns not on culpability, but on severity. A parole-eligible life sentence might simply be considered less severe than a parole-ineligible life sentence. If that were the case, all else being equal, a (less culpable) juvenile

⁶¹ See Murphy, *supra* note 59, at 151 (observing that for character retributivism, "repentance might well play a crucial role" in determining desert, because "a repentant person seems to reveal a better character than an unrepentant person"); Robbins, *supra* note 60, at 1123 (arguing that because "character affects desert," change in character is relevant to punishment deserved).

⁶² See *Roper*, 543 U.S. at 553 ("The reality that juveniles still struggle to define their identity means it is less supportable to conclude that even a heinous crime committed by a juvenile is evidence of irretrievably depraved character."); *Graham*, 130 S. Ct. at 2016 (emphasizing "*Roper's* holding that because juveniles have lessened culpability they are less deserving of the most serious forms of punishment" (citing *Roper*, 543 U.S. at 551)); see also Lee, *supra* note 50, at 724-25 (discussing *Roper's* application of negative retributivism).

⁶³ To frame the same point about culpability another way, one might, as Kyron Huigens does, distinguish between the two types of culpability involved with classic and character retributivism. Kyron Huigens, *Rethinking the Penalty Phase*, 32 ARIZ. ST. L.J. 1196, 1219, 1228-30 (2000). The culpability of classic retributivism is culpability in wrongdoing; it concerns mens rea, the fault elements of offenses, and the wrong committed. *Id.* at 1230-31. The culpability of character retributivism is culpability of the offender; it concerns responsible moral agency and the justness of imposing punishment on individuals who lack agency, such as an insane person or a minor. *Id.* at 1238-39. If a juvenile can be sentenced to any kind of life imprisonment, with or without parole, then he must have sufficient moral agency to make that a just punishment. But as a juvenile ages, he acquires greater moral agency, all things being equal. As to culpability of the offender, then, a parole board cannot possibly find that a juvenile is less deserving of punishment later than he was at the time of sentencing. And as to culpability in wrongdoing, the parole board cannot find that the offense was less grave or that the juvenile was less at fault in terms of mens rea. Those things are fixed in history.

who received a parole-eligible life sentence would be punished less severely than a (more culpable) adult who received a parole-ineligible life sentence. The parole-ineligible sentence as applied to the juvenile would be unconstitutional while the parole-eligible one would not be, even if the juvenile were never released.

The Court has suggested before that parole is relevant to severity. In *Solem v. Helm*, the Court struck down an individual sentence of life without parole as grossly disproportionate under the Eighth Amendment.⁶⁴ In *Rummel v. Estelle*, it upheld a sentence of life with the possibility of parole against a similar challenge.⁶⁵ Language in both cases made clear that “the possibility of parole, however slim, serve[d] to distinguish” the one sentence from the other.⁶⁶ Later, in *Harmelin*, the Court went even further, stating that life without parole is “the second most severe [sentence] known to the law; but life imprisonment with possibility of parole is . . . the third most severe.”⁶⁷

Why that is so, however, is not immediately obvious. *Harmelin*’s statement was a one-off. *Solem* and *Rummel*, on which *Graham* placed substantial weight in its severity analysis, never analyzed the point in depth, apparently assuming that it was more or less self-evident. Academics, in their neglect of parole, have ignored the issue almost completely.⁶⁸ But if severity turns on the maximum punishment an offender might suffer—which is how the Court’s proportionality cases have generally viewed the issue⁶⁹—then the mere availability of parole should not affect it. This is particularly true against the backdrop of the Court’s consistent deference to states’ discretion on parole decisions. *Graham* itself repeatedly insisted that the Eighth Amendment “does not require the State to release [a juvenile] offender during his

⁶⁴ 463 U.S. 277, 302-03 (1983).

⁶⁵ 445 U.S. 263, 280-81, 285 (1980).

⁶⁶ *Id.* at 281; see also *Solem*, 463 U.S. at 297 (stating that a sentence of life without the possibility of parole is “far more severe” than a sentence of life with the possibility of parole); cf. *Rummel*, 445 U.S. at 280-81 (stating that a “proper assessment” of a parole-eligible life sentence “could hardly ignore the possibility that [the offender] will not actually be imprisoned for the rest of his life”).

⁶⁷ *Harmelin v. Michigan*, 501 U.S. 957, 996 (1991). The Court, however, rejected a proportionality challenge to the life without parole sentence at issue on the ground that categorical proportionality review did not apply outside the capital context. *Id.* at 994.

⁶⁸ *Supra* note 5 notes an exception.

⁶⁹ See, e.g., Ristroph, *supra* note 4, at 76-77 (“In nearly all of the Court’s proportionality cases to date, the severity of a prison sentence is simply a question of time—of how long the prisoner will remain incarcerated.”).

natural life.”⁷⁰ It is hard to see a difference in severity between a sentence of life without parole and one of life with parole when parole release is neither required nor guaranteed. Absent a constitutional mandate imposing substantive conditions for release, offenders sentenced to life with parole can—and often will—still serve a life sentence.⁷¹ It is just that the parole board, not the sentencing judge, ultimately makes the judgment that they will do so.⁷² And it does so slowly, by degrees, and over time.

One might respond that parole release need not be guaranteed to affect severity. Parole eligibility by itself could be sufficient to alter the severity calculus because, by at least increasing the possibility of release, it decreases the “expected value” of the sentence.⁷³ Many other back-end sentencing variables, however—executive clemency, disciplinary and good-time rules, even enhanced appellate rights in capital cases—have the same effect.⁷⁴ Yet none of those factors ever has been thought to be constitutionally significant to severity for proportionality purposes. The ever present possibility that a death sentence might be commuted, for example, or the fact that only a small percentage of death row inmates are actually executed, does not render a death sentence any less severe under the Eighth Amendment.⁷⁵ Nor, as the

⁷⁰ *Graham v. Florida*, 130 S. Ct. 2011, 2030 (2010); *see also id.* (“A State is not required to guarantee eventual freedom to a juvenile offender convicted of a nonhomicide crime.”).

⁷¹ *See, e.g.*, Frase, *supra* note 4, at 56 (“[D]espite [*Graham*’s] extended discussion . . . of the diminished culpability of juvenile nonhomicide offenders, it appears that they can end up serving life without parole unless, at some point, crime control purposes justify release—their diminished culpability and other retributive values based on the original offense impose no upper limit on prison time served.”); Ristroph, *supra* note 4, at 77 (noting *Graham*’s lack of any guarantee of release).

⁷² Of course, there may be other, non-proportionality-based reasons to commit the decision on life imprisonment to the parole board *ex post* instead of the sentencing judge *ex ante*. *See infra* Part II & Section III.A.

⁷³ In its most basic form, the expected value of a sentence is the sentence imposed multiplied by the probability that it will be served. *See generally* Gary S. Becker, *Crime and Punishment: An Economic Approach*, 76 J. POL. ECON. 169 (1968) (developing the basic economic model of deterrence). The expected value of a life sentence without parole would be *Life* x 1.00; the expected value of a life sentence with a one percent chance of receiving parole would be *Life* x 0.99. All else being equal, the latter is less than the former.

⁷⁴ *E.g.*, LAWRENCE A. GREENFELD, BUREAU OF JUSTICE STATISTICS, NCJ-153858, PRISON SENTENCES AND TIME SERVED FOR VIOLENCE 1-2 (1995), *available at* <http://bjsdata.ojp.usdoj.gov/content/pub/pdf/PSATSFV.PDF>.

⁷⁵ *See, e.g.*, James S. Liebman et al., *Capital Attrition: Error Rates in Capital Cases, 1973–1995*, 78 TEX. L. REV. 1839, 1846-60 (2000) (documenting high attrition rates of

Court made clear in both *Graham* and *Solem*, does the possibility of clemency alter the severity calculus.⁷⁶ While *Graham* and *Solem* attempted to distinguish clemency from parole on grounds of clemency's alleged remoteness,⁷⁷ that claim is of dubious empirical validity,⁷⁸ particularly given the broad authority to deny parole that *Graham* claimed to have left intact.⁷⁹ More to the point, trying to separate parole from other back-end variables based on the remoteness or likelihood of relief does not solve the conceptual problem. Any differences, to the extent they exist, are merely differences of degree, not kind.⁸⁰ At a minimum, this approach would still suggest that capital sentences in states with standing moratoriums on executions (like Oregon⁸¹ and, before it repealed the death penalty altogether, Illinois⁸²) should not be considered as severe as those in states that have high execution

capital sentences); Ristroph, *supra* note 4, at 77 n.14 (noting that after Daryl Atkins's successful Eighth Amendment proportionality challenge, he was again sentenced to death, but that his death sentence was later commuted).

⁷⁶ See *Graham v. Florida*, 130 S. Ct. 2011, 2027 (2010) (“[T]he remote possibility of [executive clemency] does not mitigate the harshness of the sentence.” (citation omitted)); *Solem v. Helm*, 463 U.S. 277, 302-03 (1983) (rejecting the argument that the possibility of executive clemency altered the severity of a sentence of life without parole); see also *Harmelin v. Michigan*, 501 U.S. 957, 996 (1991) (characterizing life without parole as the “second most severe [sentence] known to the law” while acknowledging that it preserved “the possibilities of retroactive legislative reduction and executive clemency” as “flexible techniques for later reducing [a] sentence” (citation omitted) (internal quotation marks omitted)).

⁷⁷ *Graham*, 130 S. Ct. at 2027; *Solem*, 463 U.S. at 300-01.

⁷⁸ For example, in California,

[j]ust six parole-eligible murderers out of several thousand eligible were granted parole release during the tenure of Governor Gray Davis; . . . each year the parole board finds only three percent of parole-eligible prisoners serving life sentences suitable for release, and only one percent are actually released after review by the full parole board and the governor.

Ball, *Normative Elements*, *supra* note 6, at 396 (footnotes omitted).

⁷⁹ See *supra* note 70 and accompanying text.

⁸⁰ Cf. Rachel E. Barkow, *The Court of Life and Death: The Two Tracks of Constitutional Sentencing Law and the Case for Uniformity*, 107 MICH. L. REV. 1145, 1167-73 (2009) (describing ways in which death and terms-of-years sentences are similar in severity and concluding that the differences that do exist do not justify widely disparate treatments under the Eighth Amendment).

⁸¹ See Jonathan J. Cooper, *Ore. Governor Bans Death Penalty for Rest of Term*, WASH. TIMES, Nov. 23, 2011, <http://www.washingtontimes.com/news/2011/nov/23/ore-governor-bans-death-penalty-rest-term> (reporting on Oregon Governor John Kitzhaber's decision to issue a reprieve to any prisoner facing execution).

⁸² See Joseph L. Hoffmann & Nancy J. King, *Improving Criminal Justice: How Can We Make the American Criminal Justice System More Just?*, 95 JUDICATURE 59, 59 (2011) (“In Illinois, . . . shocking revelations about innocent men on death row led first to a moratorium on executions, and eventually to the abolition of capital punishment altogether.”).

rates (like Virginia, Texas, and Oklahoma⁸³). For parole to affect severity in an “expected value” sense would thus profoundly alter proportionality analysis as we know it.

Graham’s remaining answer to the severity question—that life without parole works “a forfeiture that is irrevocable”⁸⁴—is just as unsatisfying. If “irrevocable” means that no parole board exists to order early release, we run into the same problems just mentioned: in the absence of some substantive criteria for how a board must exercise its discretion, the existence of a parole board does not guarantee shorter sentences, and it is unclear how the possibility of a shorter sentence affects severity in any event. If “irrevocable” means that the punishment is somehow irreversible, final, or incapable of being corrected, the point is weaker still. As Rachel Barkow and Alice Ristroph separately observe, there is no way to reverse any portion of any sentence—be it a death sentence or a term of years—once it has already been served.⁸⁵ To the extent the ability to do so might be relevant to severity—and it is not immediately clear how it would be—irrevocability of this sort does not distinguish death or life without parole from any other sentences.⁸⁶

We could try to get around some of these problems by looking to severity metrics other than sentence length. Ristroph, one of the few scholars who has grappled with the issue, emphasizes the importance of hope to severity.⁸⁷ *Graham*’s severity discussion pointed out that the

⁸³ See Robert J. Smith, *The Geography of the Death Penalty and Its Ramifications*, 92 B.U. L. REV. 227, 238 n.49 (2012) (reporting that, from 2004 to 2009, Texas performed 134 executions, Ohio performed 25, and Oklahoma performed 22).

⁸⁴ *Graham v. Florida*, 130 S. Ct. 2011, 2027 (2010).

⁸⁵ See Barkow, *supra* note 80, at 1174; Ristroph, *supra* note 4, at 75. Of course, the State could apologize and compensate or make other reparative efforts, but the time served is lost forever. Cf. Dan Markel, *State, Be Not Proud: A Retributivist Defense of the Commutation of Death Row and the Abolition of the Death Penalty*, 40 HARV. C.R.-C.L. L. REV. 407, 468 & n.258 (2005).

⁸⁶ Offenders serving life without parole have the same rights and abilities as any other offender to raise post-conviction challenges. See generally BRIAN R. MEANS, POST-CONVICTION REMEDIES §§ 1:1, 12:1, 12:9 (2011 ed.) (reviewing postconviction remedies applicable to all offenders); WAYNE R. LAFAVE ET AL., CRIMINAL PROCEDURE §§ 28.1-28.7, at 1333-78 (5th ed. 2009) (same).

⁸⁷ See Ristroph, *supra* note 4. Outside of the Eighth Amendment context, Adam Kolber and other punishment theorists have recently debated whether and how much just punishment must take into account an offender’s subjective experience. See *infra* note 95. The debate is important, but it does not affect my basic point here, which is that any degree-based, subjective approach to assessing punishment severity would significantly alter conventional Eighth Amendment principles.

denial of parole means the denial of all “hope of restoration,” regardless of an offender’s transformation while in prison.⁸⁸ If severity turns not just on sentence length but also on the *degree* of suffering while incarcerated, then one might argue that a sentence of “life with hopelessness” is more severe than one of “life with hope”—at least if we assume that hope repeatedly dashed is better than hope denied at the outset.⁸⁹ As Ristroph explains, “An offender who is sentenced at 16 and incarcerated continuously, without parole review, until his death at 70 is punished more severely than a second offender who is sentenced at 16, granted multiple opportunities for parole review, and consistently denied parole until his death at 70.”⁹⁰ According to Ristroph, “[t]he first offender is denied hope, whereas the second ostensibly is not.”⁹¹

Here too, though, we run into difficulties. First, many legal sources of hope exist for prisoners, including gubernatorial pardons, good-time credits, probation rules, and prison regulations about visitations from family and friends.⁹² Should the varying availability of such devices among states and localities also factor into the severity calculus? Second, if hope matters because it affects offenders’ experience of punishment, then, as Ristroph suggests, should not “solitary confinement, security classifications, and other dimensions of prison conditions that render a sentence more severe without necessarily extending its duration” also be appropriate proportionality considerations?⁹³ Or, third, is the real significance of hope not in its relation-

⁸⁸ *Graham*, 130 S. Ct. at 2027; *see also id.* (noting that life without parole “means denial of hope; it means that good behavior and character improvement are immaterial; it means that whatever the future might hold in store for the mind and spirit of [the convict], he will remain in prison for the rest of his days” (alteration in original) (quoting *Naovarath v. Nevada*, 779 P.2d 944, 944 (Nev. 1989))); *id.* at 2032 (“Life in prison without the possibility of parole gives . . . no hope.”).

⁸⁹ This may well be a questionable assumption. *See* William Ruddick, *Hope and Deception*, 13 *BIOETHICS* 343, 346-47 (1999) (“We cannot assume that ‘it is better to have hoped and lost than never to have hoped at all.’”).

⁹⁰ Ristroph, *supra* note 4, at 77.

⁹¹ *Id.*

⁹² Prisoners might also have illegal or extralegal sources of hope, such as hope of escape or hope of religious redemption.

⁹³ *See id.*; *see also* DUFF, *supra* note 52, at 136-37 (noting difficulties with ranking severity of punishments); Alexander A. Reinert, *Eighth Amendment Gaps: Can Conditions of Confinement Litigation Benefit From Proportionality Theory?*, 36 *FORDHAM URB. L.J.* 53, 76-79 (2009) (arguing that proportionality principles should apply to conditions of confinement); Ristroph, *supra* note 39, at 276 n.45 (flagging the “weakness in any proportionality analysis that looks only at the length of a prison term”). It seems intuitively correct that severity cannot be measured solely in terms of years spent in prison. The

ship to suffering per se, but in the specific *object* of the hope that accompanies parole—restoration, reconciliation, reintegration? Perhaps it is not the length of the sentence, nor the suffering imposed, but the permanent exclusion of an offender as hopelessly outside the moral community, or the categorical denial of any chance to redeem oneself, that tips the severity balance.⁹⁴ But notice how far we have now come from a truly substantive notion of severity: severity now rises and falls with the creation of procedural spaces and opportunities. Like release, redemption might still be denied. It just will be denied over time.

Exactly what counts toward punishment severity under the Eighth Amendment is undertheorized, and the field could benefit from more attention to questions of this sort.⁹⁵ The point here is not to show

ultimate severity of capital punishment—which brutally shortens the actual length of incarceration—makes that clear. John Stuart Mill put the point this way:

What comparison can there really be, in point of severity, between consigning a man to the short pang of a rapid death, and immuring him in a living tomb, there to linger out what may be a long life in the hardest and most monotonous toil, without any of its alleviation or rewards—debarred from all pleasant sights and sounds, and cut off from all earthly hope, except a slight mitigation of bodily restraint, or a small improvement of diet?

21 Apr. 1868, PARL. DEB., H.C. (3d ser.) (1868) 1047 (U.K.), reprinted in PHILOSOPHICAL PERSPECTIVES ON PUNISHMENT 271, 272-73 (Gertrude Ezorsky ed. 1972).

⁹⁴ See *Graham v. Florida*, 130 S. Ct. 2011, 2032 (2010) (observing that life without parole denies any “chance for reconciliation with society”); see also *Trop v. Dulles*, 356 U.S. 86, 101 (1958) (holding unconstitutional a sentence of denationalization for military desertion as “cruel and unusual”); *Weems v. United States*, 217 U.S. 349, 366 (1910) (holding unconstitutionally “cruel and unusual” a sentence of fifteen years plus *cadena temporal* because, among other considerations, it took from the offender the hope of seeking “to retrieve his fall from rectitude”); Smith & Cohen, *supra* note 4, at 92 (“*Graham’s* most significant role may be in its recognition of redemption as an Eighth Amendment constitutional principle.”).

⁹⁵ For instance, does a negative retributivist vision of the Eighth Amendment require a strictly retributive metric for assessing punishment severity? If so, what is such a metric? Although theorists have touched on these questions in the past, sustained examination of them has been lacking, especially as they relate to the Court’s proportionality jurisprudence. The one notable exception in contemporary punishment theory is the recent debate involving John Bronsteen, Christopher Buccafusco, Chad Flanders, Adam Kolber, Dan Markel, and Jonathan Masur over the extent to which we should take into account offenders’ subjective experiences when assessing punishment, including whether such experiences are relevant to retributive punishment at all. See John Bronsteen, Christopher Buccafusco & Jonathan Masur, *Happiness and Punishment*, 76 U. CHI. L. REV. 1037 (2009); John Bronsteen, Christopher Buccafusco, & Jonathan Masur, *Retribution and the Experience of Punishment*, 98 CALIF. L. REV. 1463 (2010); Adam J. Kolber, *The Comparative Nature of Punishment*, 89 B.U. L. REV. 1565 (2009); Adam J. Kolber, Essay, *The Subjective Experience of Punishment*, 109 COLUM. L. REV. 182 (2009);

definitively that parole has no constitutional significance for severity or any other aspect of substantive proportionality law. Rather, the aim is to illustrate how much we have to twist and bend conventional proportionality concepts to make parole relevant.

II. PAROLE AND PROCEDURE

Many of the problems described above stem from a confluence of substance and procedure. Because parole guarantees no substantive outcomes, injecting parole into sentencing does not prohibit actual punishment. Instead, it provides a procedural mechanism for fine-tuning sentences on a case-by-case basis over time. In that sense, parole's Eighth Amendment significance is at least as much structural and systemic as it is substantive. Part I showed how parole's procedural dimension makes it difficult to fit into a substantive proportionality box and, implicitly, how attempting to do so obscures parole's procedural side. This Part focuses more squarely on parole's procedural aspects and offers an understanding of its constitutional significance as rooted in concerns about reliability and individualized sentencing.

Although *Graham* cast its doctrinal position in substantive terms, it is closer to a rule of constitutional criminal procedure. *Graham* hinged the constitutionality of punishment on what is essentially a procedural condition. The most severe punishment for juvenile offenders—life in prison—can still be imposed, but only if it is accompanied by the procedural protection of parole. Parole thus conceptually severs *Graham* from *Roper*, *Atkins*, and other classic proportionality cases on which it relied for much of its doctrinal support.⁹⁶ Despite their obvious similarities, none of those cases linked the constitutionality of punishment

Dan Markel & Chad Flanders, *Bentham on Stilts: The Bare Relevance of Subjectivity to Retributive Justice*, 98 CALIF. L. REV. 907 (2010). For earlier scholarly forays into the issue, see, for example, DUFF, *supra* note 52, at 136-37, ANDREW VON HIRSCH, CENSURE AND SANCTIONS 34-35 (1993), NIGEL WALKER, WHY PUNISH? 106-10 (1991), Andrew Ashworth & Elaine Player, *Sentencing, Equal Treatment, and the Impact of Sanctions*, in FUNDAMENTALS OF SENTENCING THEORY 251, 254-61 (Andrew Ashworth & Martin Wasik eds., 1998), and Michael Tonry, *Proportionality, Parsimony, and Interchangeability of Punishments*, in PENAL THEORY AND PRACTICE: TRADITION AND INNOVATION IN CRIMINAL JUSTICE 59, 73 (Anthony Duff et al. eds., 1994).

⁹⁶ See, e.g., *Kennedy v. Louisiana*, 554 U.S. 407, 421 (2008) (holding that the Eighth Amendment prohibits the death penalty for the rape of a child); *Enmund v. Florida*, 458 U.S. 782, 801 (1982) (holding that the Eighth Amendment prohibits the death penalty for a nonhomicide crime committed against an adult); *Coker v. Georgia*, 433 U.S. 584, 592 (1977) (plurality opinion) (holding that the Eighth Amendment prohibits the death penalty for the rape of an adult).

to a procedural rule.⁹⁷ When it came to punishment, those cases drew hard and fast substantive lines.

Graham, in contrast, did not. *Graham* mandated a granular, textured, and open-ended sentencing inquiry for juvenile nonhomicide offenders. That inquiry muddles together substantive justifications for punishment with procedural checks and balances on the sentencing process. Substantive considerations still matter: “maturity,”⁹⁸ “incorrigibility,”⁹⁹ “capacity for change,”¹⁰⁰ “depravity,”¹⁰¹ and other offender characteristics will continue to inform the sentencing determination. But the point is not to foreclose any one sentencing outcome at the outset based on those considerations, but to tailor and individualize punishment by spreading the exercise of sentencing discretion over time and to a larger pool of decisionmakers. After *Graham*, a juvenile can still grow old and die in prison, but he must receive repeated and closer sentencing looks before doing so.

Graham is not the first time the Court has hinged the constitutionality of a punishment on this type of procedural rule. The Court’s seminal line of cases requiring individualized capital sentencing determinations took a similar proceduralist approach. Beginning with *Woodson v. North Carolina*, the Court invoked the Eighth Amendment to strike down various state capital sentencing schemes that prevented sentencers from engaging in a “particularized consideration” of the offender and the offense.¹⁰² *Woodson* involved a mandatory death penalty statute that required imposition of the death penalty upon conviction for first-degree murder.¹⁰³ But the cases it spawned quickly came to stand for the more general proposition that, as the Court explained in *Lockett v. Ohio*, the sentencer must not be precluded from consider-

⁹⁷ For example, no amount of additional procedure would have rendered the execution of juveniles lawful in *Roper*. See 543 U.S. 551, 568-69 (2005). The same holds true for the executions at issue in *Kennedy*, 554 U.S. at 421, *Atkins*, 536 U.S. 304, 321 (2002), *Enmund*, 458 U.S. at 801, and *Coker*, 433 U.S. at 592. See generally Steiker, *supra* note 36, at 298 (observing that *Roper* and *Atkins* created “substantive limitations” on executions of juveniles and the mentally retarded).

⁹⁸ *Graham v. Florida*, 130 S. Ct. 2011, 2030 (2010).

⁹⁹ *Id.* at 2054.

¹⁰⁰ *Id.* at 2030.

¹⁰¹ *Id.* at 2054.

¹⁰² 428 U.S. 280, 303 (1976) (plurality opinion).

¹⁰³ See *id.* at 286 (“A murder which shall be perpetrated by . . . any . . . willful, deliberate and premeditated killing, or which shall be committed in the perpetration or attempt to perpetrate any . . . felony, shall be deemed to be murder in the first degree and shall be punished with death.” (quoting N.C. GEN. STAT. § 14-17 (Cum. Supp. 1975))).

ing as a mitigating factor “any of the circumstances of the offense” or “any aspect of a defendant’s character or record.”¹⁰⁴ Together, *Woodson* and *Lockett* constitutionalized a requirement of textured and granular sentencing in capital cases. The Court has applied the *Woodson/Lockett* principle over the years to invalidate state schemes that prohibited consideration of a wide range of factors in sentencing, including an offender’s social and financial poverty,¹⁰⁵ abuse as a child,¹⁰⁶ mental impairment caused by inhaling gasoline,¹⁰⁷ retardation,¹⁰⁸ borderline IQ,¹⁰⁹ youth,¹¹⁰ model behavior as a pretrial detainee,¹¹¹ and status as a “fond and affectionate uncle.”¹¹²

Graham did not explicitly rely on *Woodson* and *Lockett*, and commentators, focused on substantive proportionality doctrine, have overlooked the connection. But the parallel is worth exploring because it helps illuminate the procedural side of parole’s constitutional significance in the decision. As with *Graham*, it is hard to tie the particulars of the *Woodson/Lockett* principle to a strictly retributivist Eighth Amendment limitation on punishment. The factors relevant to the *Woodson/Lockett* line of cases mirror those relevant to parole with their broad and diverse mix of backward- and forward-looking, retributivist and consequentialist considerations. Some of those factors relate to future dangerousness.¹¹³ Some concern responsibility for the offense.¹¹⁴

¹⁰⁴ 438 U.S. 586, 604 (1978) (plurality opinion); see also *Skipper v. South Carolina*, 476 U.S. 1, 4 (1986) (“[I]n capital cases ‘the sentencer . . . [may] not be precluded from considering, as a mitigating factor, any aspect of a defendant’s character or record and any of the circumstances of the offense that the defendant proffers as a basis for a sentence less than death.’” (second alteration in original) (emphasis omitted) (quoting *Eddings v. Oklahoma*, 455 U.S. 104, 110 (1982))). The statute struck down in *Lockett*, while not a mandatory death penalty statute, restricted the capital sentencer’s consideration of mitigating circumstances to only three specified factors. See 438 U.S. at 607 (citing OHIO REV. CODE ANN. § 2929.04(B) (West 1975)).

¹⁰⁵ *Hitchcock v. Dugger*, 481 U.S. 393, 397 (1987).

¹⁰⁶ *Eddings*, 455 U.S. at 115-16.

¹⁰⁷ *Hitchcock*, 481 U.S. at 397.

¹⁰⁸ *Penry v. Lynaugh*, 492 U.S. 302, 340 (1989).

¹⁰⁹ *McKoy v. North Carolina*, 494 U.S. 433, 436-37 (1990).

¹¹⁰ *Mills v. Maryland*, 486 U.S. 367, 370 (1988).

¹¹¹ *Skipper v. South Carolina*, 476 U.S. 1, 14 (1986).

¹¹² *Hitchcock*, 481 U.S. at 397. See generally Scott W. Howe, *The Failed Case for Eighth Amendment Regulation of the Capital-Sentencing Trial*, 146 U. PA. L. REV. 795, 804-07 (1998) (discussing cases applying the *Woodson/Lockett* individualization rule).

¹¹³ See, e.g., *Sumner v. Shuman*, 483 U.S. 66, 82 (1987) (requiring consideration of evidence of offender’s ability to control violent behavior); *Skipper*, 476 U.S. at 6-7 (requiring consideration of evidence of offender’s ability to adapt to prison life).

Some concern capacity for rehabilitation or potential to contribute to society.¹¹⁵ Some reference general good character or moral merit.¹¹⁶ But all are part of the mitigation inquiry. As Carol and Jordan Steiker and others observe, the *Woodson/Lockett* principle suggests that “there is no substantive limitation at all on a defendant’s ability to present” or the sentencer’s discretion to consider mitigating factors when making an individualized determination of whether to impose a death sentence.¹¹⁷ Indeed, as Scott Howe notes, the Court has implied that where mitigating evidence may be relevant to more than one purpose of punishment, the sentencer must be free to consider its impact on any of the purposes to which it might relate.¹¹⁸

While the Court’s failure to articulate a penological theory for the individualization requirement has troubled some commentators,¹¹⁹ the

¹¹⁴ See, e.g., *Chaney v. Brown*, 730 F.2d 1334, 1357-58 (10th Cir. 1984) (requiring consideration of evidence of offender’s limited participation in the crime).

¹¹⁵ See, e.g., *Coleman v. Risley*, 839 F.2d 434, 453 n.7, 455 n.8 (9th Cir. 1988) (requiring consideration of evidence of offender’s service to the community and the military); *Miller v. Wainwright*, 798 F.2d 426, 430-31 (11th Cir. 1986) (requiring consideration of evidence of offender’s prospects for rehabilitation), *vacated sub nom. Dugger v. Miller*, 480 U.S. 901 (1987).

¹¹⁶ See, e.g., *Coleman*, 839 F.2d at 453 n.7, 455 n.8 (requiring consideration of evidence of offender’s general good character); *Armstrong v. Dugger*, 833 F.2d 1430, 1433 (11th Cir. 1987) (requiring consideration of evidence of offender’s hardworking nature).

¹¹⁷ Carol S. Steiker & Jordan M. Steiker, *Let God Sort Them Out? Refining the Individualization Requirement in Capital Sentencing*, 102 YALE L.J. 835, 853 (1992) (reviewing BEVERLY LOWRY, *CROSSED OVER: A MURDER, A MEMOIR* (1992)); see also *Walton v. Arizona*, 497 U.S. 639, 663 (1990) (Scalia, J., concurring in part and concurring in the judgment) (stating that the Eighth Amendment contains no “objective criterion of what is mitigating”); Louis D. Billionis, *Moral Appropriateness, Capital Punishment, and the Lockett Doctrine*, 82 J. CRIM. L. & CRIMINOLOGY 283, 301-02 (1991) (observing that *Lockett*’s individualization requirement “contains no reference to any particular moral theory or theories” and instead embraces a principle of “moral neutrality”); Garvey, *supra* note 59, at 1011 (discussing the “laissez-faire character” of the capital sentencing mitigation inquiry); Howe, *supra* note 112, at 809-10 (stating that the “individualization requirement calls for an expansive inquiry and almost unfettered sentencer choice”).

Nor is there any clear substantive standard governing aggravating factors, which can and often do include both retributivist and forward-looking, consequentialist considerations. See Howe, *supra* note 112, at 834 (noting that the Court has not “required that aggravating circumstances focus on offender deserts as opposed to utilitarian questions” and “has not even required that capital sentencers be advised about the substantive question to be resolved at the sentencing hearing”); Steiker & Steiker, *supra*, at 854-55 (discussing the types and functions of aggravating circumstances that capital sentencers consider).

¹¹⁸ See Howe, *supra* note 112, at 807 & n.49 (citing *Skipper*, 476 U.S. at 7).

¹¹⁹ See, e.g., Steiker & Steiker, *supra* note 117, at 858; see also Garvey, *supra* note 59, at 1011; Howe, *supra* note 112, at 816-18.

Court has never seen the particulars of that requirement as a matter of substantive punishment theory. *Woodson* and *Lockett* were premised on the notion that “the fundamental respect for humanity” inherent in the Eighth Amendment required a special degree of reliability in capital sentencing.¹²⁰ Reliability necessitated individualization because sentencers could ensure “a just and appropriate sentence” only by “consider[ing] the character and record of the individual offender and the circumstances of the particular offense.”¹²¹ Individualization, in turn, required that the sentencer have unfettered choice to consider virtually any mitigating factor offered by the offender. This granular approach to sentencing provided a “greater degree of reliability” by minimizing the “risk that the death penalty will be imposed in spite of factors which may call for a less severe penalty.”¹²²

The “fundamental weakness”¹²³ of the mandatory sentencing schemes that the *Woodson* Court struck down was their “inability to reliably determine that death was the morally appropriate sentence” in each case.¹²⁴ Legislatures, the Court recognized, were ill equipped to individualize *ex ante* through statute. Exhaustively specifying a definitive, closed, and preweighed set of statutory factors for when death should be imposed was impossible and frustrated the fine-grained, particularized inquiry that was a “constitutionally indispensable part of the process of inflicting the penalty of death.”¹²⁵ Legislatures could

¹²⁰ *Woodson v. North Carolina*, 428 U.S. 280, 304-05 (1976) (plurality opinion).

¹²¹ *Id.* at 304.

¹²² *Lockett v. Ohio*, 438 U.S. 586, 604-05 (1978) (plurality opinion); *see also* *Monge v. California*, 524 U.S. 721, 732 (1998) (“Because the death penalty is unique ‘in both its severity and its finality,’ we have recognized an acute need for reliability in capital sentencing proceedings.” (quoting *Gardner v. Florida*, 430 U.S. 349, 357 (1977))); *Butler v. South Carolina*, 459 U.S. 932, 933 (1982) (Marshall, J., dissenting from denial of certiorari) (“Recognizing the extraordinary consequences of the capital sentencing process, this Court has stressed ‘the need for reliability in the determination that death is the appropriate punishment in a specific case.’ Accordingly, ‘we have invalidated procedural rules that tended to diminish the reliability of the sentencing determination.’” (quoting *Woodson*, 428 U.S. at 305 and *Beck v. Alabama*, 447 U.S. 625, 638 (1980))); *Bilionis*, *supra* note 117, at 321 (“*Lockett* is concerned with the ‘unacceptable risk’ that the sentencer’s inability or refusal to consider and give effect to mitigating evidence might have affected the reliability of its moral judgment.”); *Howe*, *supra* note 112, at 818 (“The argument in favor of the broad individualization mandate is that sentencers have the opportunity to consider much more information about the offender . . . and that this additional information will lead them to make better judgments.”).

¹²³ *Woodson*, 428 U.S. at 291.

¹²⁴ *Bilionis*, *supra* note 117, at 290.

¹²⁵ *Woodson*, 428 U.S. at 304; *see also* *Roberts v. Louisiana*, 428 U.S. 325, 333 (1976) (“The futility of attempting to solve the problems of mandatory death penalty statutes by narrowing . . . the capital offense stems from [the] rejection of the belief that ‘every

still make initial sentencing judgments by laying out categories of crimes and aggravating factors that rendered defendants “death-eligible”; indeed, to protect against the wholly arbitrary and inconsistent administration of the death penalty, *Furman v. Georgia*¹²⁶ and its progeny effectively required that they do so.¹²⁷ But distrust of legislatures’ ultimate competence to articulate reliable sentencing judgments in advance—whether through mandatory death-penalty statutes or otherwise—required the final decision on punishment to lie in the hands of the sentencer, who was best positioned to evaluate “the diverse frailties of humankind.”¹²⁸

offense in a like legal category calls for an identical punishment without regard to the past life and habits of a particular offender.” (quoting *Williams v. New York*, 337 U.S. 241, 247 (1949))); Bilonis, *supra* note 117, at 294 (“As *Woodson* acknowledged, society’s rejection of mandatory death penalty statutes manifests an unwillingness to entrust the legislatures with the task of formulating a definitive and close-ended moral calculus for choosing between life and death.”); Robert Weisberg, *Deregulating Death*, 1983 SUP. CT. REV. 305, 308 (“[A] judge or jury’s decision to kill is an intensely moral, subjective matter that seems to defy the designers of general formulas for legal decision.”).

As the second Justice Harlan famously expressed the point in *McGautha v. California*:

Those who have come to grips with the hard task of actually attempting to draft means of channeling capital sentencing discretion have confirmed the lesson taught by . . . history . . . To identify before the fact those characteristics of criminal homicides and their perpetrators which call for the death penalty, and to express these characteristics in language which can be fairly understood and applied by the sentencing authority, appear to be tasks which are beyond present human ability.

402 U.S. 183, 204 (1971).

¹²⁶ 408 U.S. 238 (1972).

¹²⁷ See *Lewis v. Jeffers*, 497 U.S. 764, 774 (1990) (“[*Gregg*] requires a State to ‘channel the sentencer’s discretion by clear and objective standards that provide specific and detailed guidance and that make rationally reviewable the process for imposing a sentence of death.’” (quoting *Godfrey v. Georgia*, 446 U.S. 420, 428 (1980))); *Gregg v. Georgia*, 428 U.S. 153, 195 (1976) (“[T]he concerns expressed in *Furman* that the penalty of death not be imposed in an arbitrary or capricious manner can be met by a carefully drafted statute that ensures that the sentencing authority is given adequate information and guidance.”). See generally Carol S. Steiker & Jordan M. Steiker, *Sober Second Thoughts: Reflections on Two Decades of Constitutional Regulation of Capital Punishment*, 109 HARV. L. REV. 355, 361-64, 375-78 (1995) (tracing the evolution of Eighth Amendment capital sentencing requirements aimed at promoting consistency).

¹²⁸ *Woodson*, 428 U.S. at 304; see also *Eddings v. Oklahoma*, 455 U.S. 104, 113-14 (1982) (holding that courts cannot prevent capital sentencers from considering “any relevant mitigating evidence”). Numerous commentators and several Justices have noted the tension between *Furman*’s mandate of consistency and nonarbitrariness and *Woodson*’s mandate of individualization. See, e.g., Garvey, *supra* note 59, at 1001 nn.48-49 (collecting articles and cases that illustrate the uneasy relationship between consistency and individualization); Steiker & Steiker, *supra* note 127 (reviewing develop-

Similar concerns permeate *Graham*. The opinion is rife with references to risks that sentencing judgments underlying juvenile life without parole might be inaccurate, untrustworthy, or otherwise questionable.¹²⁹ As in the capital context, some of those risks stem from institutional breakdowns in the sentencing process. As the process unfolds, the institutions that channel juveniles toward a sentence of life without parole do little reliably to capture only the worst juvenile offenders, either because of failures in discretion or inherent limits of institutional competence. At the beginning of the process, legislatures bump up against the same problems just discussed. Statutes authorizing life without parole paint only in the broadest strokes. Offenders are generally eligible if they have committed very serious crimes, or are substantial recidivists, or some combination of both; statutes usually make no attempt to tailor beyond such broad categories.¹³⁰ A number of jurisdictions even make life without parole mandatory for certain serious crimes,¹³¹ a practice that *Harmelin* explicitly upheld.¹³²

Many legislatures, moreover, may not have fully appreciated the consequences for juveniles when they set up these schemes. Most statutes authorizing punishments of life without parole are general sentencing statutes that apply to criminal prosecutions of adult offenders;

ment of and tensions within constitutional capital punishment doctrine). I do not wade into that issue here.

¹²⁹ See, e.g., *Graham v. Florida*, 130 S. Ct. 2011, 2026 (2010) (discussing juveniles' transient characters and the difficulty that even experts have distinguishing the "irreparabl[y] corrupt[]" from the merely "unfortunate" juveniles (citation omitted) (internal quotation marks omitted)); *id.* at 2029 (observing that juveniles' characteristics make judgments of incorrigibility "questionable").

¹³⁰ See, e.g., MD. CODE ANN., CRIM. LAW § 14-101(c) (West 2002) ("[O]n conviction for a fourth time of a crime of violence, a person who has served three separate terms of confinement in a correctional facility as a result of three separate convictions of any crime of violence shall be sentenced to life imprisonment without the possibility of parole."); WASH. REV. CODE ANN. § 9.94A.570 (West 2010) ("Notwithstanding the statutory maximum sentence or any other provision of this chapter, a persistent offender shall be sentenced to a term of total confinement for life without the possibility of release . . .").

¹³¹ See ASHLEY NELLIS & RYAN S. KING, THE SENTENCING PROJECT, NO EXIT: THE EXPANDING USE OF LIFE SENTENCES IN AMERICA 31 (2009) ("[T]here are no sentencing options available to judges [of juveniles in criminal courts]; mandatory life sentences are required for certain crimes through state statute. In these cases, one's young age or other mitigating factors cannot be included in determining the appropriate sentence length."); Wayne A. Logan, *Proportionality and Punishment: Imposing Life Without Parole on Juveniles*, 33 WAKE FOREST L. REV. 681, 691 n.40 (1998) (citing mandatory life without parole statutes).

¹³² The petitioner in *Harmelin* raised both an Eighth Amendment proportionality challenge and a *Woodson/Lockett* individualization challenge. The Court rejected both. See *Harmelin v. Michigan*, 501 U.S. 957, 994-96 (1991).

they do not target juveniles or juvenile proceedings.¹³³ Juveniles become subject to them only after being “waived” into adult court. Once there, they face the same sentences that could be given to any adult offender.¹³⁴

Historically, juvenile waiver required an individualized, case-by-case, judicial determination as an independent check on the prosecution of juveniles.¹³⁵ But adult prosecution of juveniles has greatly expanded with the tough-on-crime movement of the last thirty years.¹³⁶ Many states now make waiver mandatory for certain crimes.¹³⁷ Many also authorize prosecutorial waiver or direct charging in criminal court

¹³³ See, e.g., GA. CODE ANN. § 17-10-16(a) (2008) (“Notwithstanding any other provision of law, a person who is convicted of an offense committed after May 1, 1993 . . . may be sentenced to . . . imprisonment for life without parole . . .”); WYO. STAT. ANN. § 6-10-301(b) (2009) (“A person sentenced to life imprisonment without parole shall not be eligible for parole and shall remain imprisoned under the jurisdiction of the department of corrections during the remainder of his life . . .”); see also sources cited *supra* note 130.

¹³⁴ See NELLIS & KING, *supra* note 131, at 31 (“Once transferred to the adult court, young people face the same sentencing options as adults, including the possibility of sentences to life or life without parole.”); Barry C. Feld, *A Slower Form of Death: Implications of Roper v. Simmons for Juveniles Sentenced to Life Without Parole*, 22 NOTRE DAME J.L. ETHICS & PUB. POLY 9, 16 (2008) (“Once states convict juveniles in criminal court, judges sentence them as if they were adults and send them to the same prisons as adults.”).

¹³⁵ See, e.g., Hector Linares & Derwyn Bunton, *An Open Door to the Criminal Courts: Analyzing the Evolution of Louisiana’s System for Juvenile Waiver*, 71 LA. L. REV. 191, 196 (2010) (discussing the individualized waiver standard); Melissa A. Scott, *The “Critically Important” Decision of Waiving Juvenile Court Jurisdiction: Who Should Decide?*, 50 LOY. L. REV. 711, 729 (2004) (explaining that before a judge may transfer a juvenile to a criminal court, the judge must “examine the juvenile’s amenability to treatment and rehabilitation, and the danger the juvenile poses to the public” (citing LA. CHILD CODE ANN. art. 862 (2004))).

¹³⁶ See Barry C. Feld, *The Transformation of the Juvenile Court—Part II: Race and the “Crack Down” on Youth Crime*, 84 MINN. L. REV. 327, 357 (1999) (attributing the sixty-eight percent increase in judicial waivers between 1988 and 1992 mainly to tough-on-crime measures); Ellie D. Shefi, *Waiving Goodbye: Incarcerating Waived Juveniles in Adult Correctional Facilities Will Not Reduce Crime*, 36 U. MICH. J.L. REFORM 653, 661 (2003) (explaining that the “get tough” policies of the 1990s resulted in “easier means of transferring juveniles to adult court” and “expanded sentencing options”).

¹³⁷ See, e.g., ARK. CODE ANN. § 9-27-318(a) (2008) (restricting the State’s use of juvenile delinquency proceedings to cases involving juveniles under age fifteen or juveniles under age eighteen whose conduct would have constituted a misdemeanor if committed by an adult); GA. CODE ANN. § 15-11-28(b)(2)(A)(i)–(vii) (providing exclusive jurisdiction in criminal court over children ages thirteen to seventeen who are alleged to have committed certain serious felonies). See generally Martha June Rossiter, Comment, *Transferring Children to Adult Criminal Court: How to Best Protect Our Children and Society*, 27 J. JUV. L. 123, 126, 128-31 (2006) (reviewing and critiquing mandatory waiver laws).

in certain circumstances—powers that, far from being used sparingly, are routinely exercised as plea-bargaining chips by prosecutors seeking maximum leverage.¹³⁸ The end result of this patchwork of harsh adult sentencing statutes and liberal waiver rules is that, as *Graham* stated, “eligibility of a juvenile offender for life without parole does not indicate that the penalty has been endorsed through deliberate, express, and full legislative consideration.”¹³⁹

Once the juvenile is in the criminal pipeline, an additional source of sentencing risk becomes an issue: risk that flows from the unique characteristics of juveniles. Some of those characteristics—impulsiveness, mistrust of authority, and poor long-term decisionmaking—create special difficulties for juvenile representation and increase “the risk that . . . a court or jury will erroneously conclude that a particular juvenile is sufficiently culpable to deserve life without parole”¹⁴⁰

¹³⁸ See Lisa S. Beresford, Comment, *Is Lowering the Age at Which Juveniles Can Be Transferred to Adult Criminal Court the Answer to Juvenile Crime? A State-by-State Assessment*, 37 SAN DIEGO L. REV. 783, 806 (2000) (observing that “the state can use the potential for transfer and the ability to appeal transfer decisions as a bargaining chip”); Lisa A. Cintron, Comment, *Rehabilitating the Juvenile Court System: Limiting Juvenile Transfers to Adult Criminal Court*, 90 NW. U. L. REV. 1254, 1267 (1996) (discussing the incentives of even innocent juveniles to take pleas that will keep them in juvenile court); see also *Hughes v. State*, 653 A.2d 241, 249 (Del. 1994) (stating that prosecutorial waiver “strip[s] the judiciary of its independent jurisdictional role in the adjudication of children”); cf. Josh Bowers, *Legal Guilt, Normative Innocence, and the Equitable Decision Not to Prosecute*, 110 COLUM. L. REV. 1655, 1660 (2010) (“[D]eference to perceived prosecutorial supremacy is defensible only if, all else equal, the prosecutor is most competent institutionally to exercise equitable discretion. At least when it comes to certain charging decisions, this is far from clear.”).

¹³⁹ *Graham v. Florida*, 130 S. Ct. 2011, 2026 (2010); see also *Thompson v. Oklahoma*, 487 U.S. 815, 826 n.24 (1988) (observing that state legislatures’ authorization of waiver for a particular crime “tells us nothing about the judgment these States have made regarding the appropriate punishment for . . . youthful offenders” (emphasis omitted)); *id.* at 850 (O’Connor, J., concurring in the judgment) (explaining that when a legislature allows juveniles to be processed through the adult criminal justice system “it does not necessarily follow that the legislature[] . . . deliberately concluded that it would be appropriate to impose capital punishment on [juveniles]”); Logan, *supra* note 131, at 718, 720 (noting “the possibly unanticipated interplay” of waiver and mandatory punishment statutes “often contained in disparate sections of a State’s statute books” and observing that “it is unclear whether legislators comprehend the actual consequences of their radical measures to overhaul criminal justice”); *id.* at 721 (concluding that “there is scant reason to believe that waiver, in whatever form, serves to winnow in any reliable way only those juveniles that should be prosecuted as adults”); Katherine Hunt Federle, *Emancipation and Execution: Transferring Children to Criminal Court in Capital Cases*, 1996 WIS. L. REV. 447, 484 (noting that waiver is often based upon “bureaucratic rather than individuated concerns which preclude an assessment of the minor’s blameworthiness”).

¹⁴⁰ *Graham*, 130 S. Ct. at 2032.

Others frustrate the very nature of the sentencing inquiry. *Graham* repeatedly stressed that juveniles' plasticity and capacity for change makes judgments of incorrigibility at the time of sentencing especially suspect.¹⁴¹ With juveniles in particular, we can never be fully confident that they are as bad, corrupt, depraved, or irredeemable as we might think in the short time after they have committed a serious crime.

The structure of sentencing exacerbates these problems. The one-shot nature of the process means that the most important judgments are front-loaded to the time of sentencing. The pressures described above feed into a system that then attempts to judge the most malleable offenders at a single point in time, without—to use *Graham's* words—the “corroborat[ion]” of, say, later “prison misbehavior,” “failure to mature,”¹⁴² or any of numerous other factors that might help to reveal a juvenile’s “true character.”¹⁴³ Indeed, *Graham* rested the need for a categorical rule on the inability of front-end sentencers—including reviewing courts applying a case-by-case proportionality analysis—to distinguish “with sufficient accuracy” the truly “incorrigible juvenile offenders from the many that have the capacity for change.”¹⁴⁴ Properly understood, this language does not refer to the difference between case-by-case and categorical judgments per se; parole boards, after all, also make case-by-case judgments. Instead, it is about the inability to determine an individual juvenile offender’s true nature at T_1 without some notion of what characteristics he will exhibit long after, at T_2 . When it comes to juveniles, in short, there are special reasons to doubt the trustworthiness of the moral judgments made at sentencing.¹⁴⁵

¹⁴¹ *Id.* at 2029-30; see also NELLIS & KING, *supra* note 131, at 32 (“A review of juvenile life without parole cases contradicts the general assumption that these sentences are reserved only for the most chronically violent youth, ‘the worst of the worst.’” (citing HUMAN RIGHTS WATCH, THE REST OF THEIR LIVES: LIFE WITHOUT PAROLE FOR CHILD OFFENDERS IN THE UNITED STATES 1-2 (2005), available at <http://www.amnestyusa.org/sites/default/files/pdfs/therestoftheirlives.pdf>)); Logan, *supra* note 131, at 716 (“[I]t is increasingly evident that the justice system has a highly uneven capacity to accurately assess juvenile competency, both for fitness to stand trial and punishment . . .”).

¹⁴² *Graham*, 130 S. Ct. at 2029.

¹⁴³ *Id.* at 2033.

¹⁴⁴ *Id.* at 2032.

¹⁴⁵ As *Graham* implied, this is even more true where the sentencing occurs relatively close in time to the commission of an especially heinous crime, before emotions have had a chance to cool. See *id.* at 2032 (noting the “unacceptable likelihood” that a heinous crime could overpower the mitigating aspects of youth (citing *Roper v. Simmons*, 543 U.S. 551, 573 (2005))).

These reliability and individualization concerns stand in contrast to those of typical proportionality cases, which look to substantive concepts like culpability and severity to flatly prohibit punishment at the outset.¹⁴⁶ In the end, *Graham* eschewed any straightforward approach to substance. The Court did not limit its uneasiness with juvenile sentencing to any single substantive metric. Errors in assessing future dangerousness, moral culpability, the potential for rehabilitation, and incentives for compliance all contributed to the decision.¹⁴⁷ Nor did the Court limit which sentencing considerations might carry significance decades after sentencing at a parole hearing. It assumed that amorphous notions like depravity, irredeemability, incorrigibility, and character surely would carry weight. Even the “demonstrated maturity and rehabilitation” that the Court mentioned as a substantive guidepost for future parole inquiries does not narrow the universe of possible factors to be considered.¹⁴⁸ How does one measure “maturity” and “rehabilitation,” exactly? Very likely, a parole board attempting to do so would look at some mushy, underdefined combination of many of the things just mentioned: evidence of depravity, irredeemability, incorrigibility, and other aspects of a juvenile’s “true character.”¹⁴⁹ These traits cannot easily be tied to one clean substantive vision of punishment, and the Court did not try to do so.

Graham’s response to the reliability problem instead took the form of a procedural sentencing rule. But *Graham*’s rule was a twist on the rule established in *Woodson* and *Lockett*. *Woodson* and *Lockett* pursued fine-grainedness by diversifying sentencing across mitigating considerations.¹⁵⁰ *Graham* did so by diversifying sentencing across time and institutions. At least in theory, *Graham* could have taken the *Woodson*/*Lockett* approach. Doing so would have required for juvenile life-without-parole determinations the same individualized, holistic, and

¹⁴⁶ See *supra* notes 51-54 and accompanying text.

¹⁴⁷ See *Graham*, 130 S. Ct. at 2029 (noting inherent difficulties in accurately determining whether a juvenile is “incorrigible,” and observing that despite *Graham*’s “escalating pattern of criminal conduct, . . . it does not follow that he would be a risk to society for the rest of his life” (citations omitted) (internal quotation marks omitted)); *id.* at 2031 (discussing “the possibility that the offender will receive a life without parole sentence for which he or she lacks the moral culpability”); *id.* at 2032 (discussing the effect of life without parole on a juvenile’s “incentive to become a responsible individual”).

¹⁴⁸ *Id.* at 2030.

¹⁴⁹ See, e.g., Chanenson, *The Next Era*, *supra* note 6, at 450 & n.312 (2005) (observing that even when explicit criteria and principles exist to guide parole boards’ release determinations, their process is opaque, and the precise weight given to each factor is unclear).

¹⁵⁰ See *supra* notes 102-12, 120-22 and accompanying text.

case-by-case mitigation inquiry that is now de rigueur in capital cases, but is still haphazard at best in juvenile sentencing.¹⁵¹ The merits (or demerits) of the Court's approach to capital sentencing, of course, are a subject of much debate.¹⁵² More to the point, it is not clear that better-focused attempts at front-end individualization would do much good in the case of juveniles. If the reliability problem stems in crucial part from the fact that it is too hard to know a juvenile's true nature at the time of sentencing, loading more factors into the front-end sentencing inquiry will not necessarily solve the problem.¹⁵³ What is needed is *temporal* individualization, a reassessment with the benefit of hindsight in the form of a constitutional "second look."¹⁵⁴

To be clear, none of this is to say that *Graham* and *Woodson/Lockett* have nothing to do with substantive proportionality concerns. On the most basic level, they clearly do. *Woodson/Lockett* was not simply about avoiding mistakes in sentencing. It was about avoiding mistakes in capital sentencing—mistakes in assessing who is the worst of the worst and therefore should be subject to the most severe penalty known to law. The principle that the death penalty must be restricted to only the worst of the worst offenders, which the opinions in *Furman v. Georgia* first embraced, is clearly a substantive proportionality principle.¹⁵⁵

¹⁵¹ See Steiker & Steiker, *supra* note 4, at 82 (stating that courts have been "remarkably deferential" to states' decisions about the extent to which sentencers must consider "youth as a mitigating factor in the sentencing of juveniles").

Chief Justice Roberts argued for a similar approach in his concurrence in the judgment. But, instead of creating a new rule in the *Woodson/Lockett* vein, the Chief Justice would have folded the mitigation inquiry into *Harmelin's* gross disproportionality test for noncapital cases, leaving to reviewing courts' discretion exactly how to consider a juvenile's particular mitigating circumstances in each case. *Graham*, 130 S. Ct. at 2040-42 (Roberts, C.J., concurring in the judgment); see also Barkow, *supra* note 4, at 51-52 (analyzing the Chief Justice's approach).

¹⁵² See *supra* note 95.

¹⁵³ Constitutionalizing a right to the presentation of mitigating circumstances for life without parole also would have required the Court to overrule its decision in *Harmelin*, or at least explicitly to restrict it to adult offenders.

¹⁵⁴ See, e.g., Douglas Berman, Afternoon Keynote Address, *Encouraging (and Even Requiring) Prosecutors to Be Second-Look Sentencers*, 19 TEMP. POL. & CIV. RTS. L. REV. 429, 437-38 (2010) (discussing second-look sentencing).

¹⁵⁵ See *Furman v. Georgia*, 408 U.S. 238, 242, 249-52 (1972) (Douglas, J., concurring); *id.* at 279 (Brennan, J., concurring); *id.* at 309-10 (Stewart, J., concurring); see also *Kennedy v. Louisiana*, 554 U.S. 407, 420 (2008) ("[C]apital punishment must 'be limited to those offenders who commit a narrow category of the most serious crimes' and whose extreme culpability makes them the most deserving of execution." (quoting *Roper v. Simmons*, 543 U.S. 551, 568 (2005))); *Kansas v. Marsh*, 548 U.S. 163, 206

Woodson/Lockett and the Court's other "super due process for death" cases laid out the procedures necessary to implement that principle reliably and accurately.¹⁵⁶

Graham might be reconceptualized in this way, as having both a substantive and a procedural side. *Graham's* substantive side rests on the proportionality principle that a life sentence—after *Roper*, now the most severe penalty available for juvenile offenders—must be restricted to only those truly deserving, worst of the worst juveniles. *Graham's* procedural side establishes the first broad contours of the constitutional procedures necessary to make that individualized, morally reliable assessment. In doing so, it recognizes that, in light of the unique difficulties and uncertainties associated with sentencing juveniles, we cannot act with confidence until after some time has passed.

III. PAROLE AND THE FUTURE OF SENTENCING REGULATION

Recognizing parole's procedural significance does not provide a neat and tidy answer to every question that *Graham* raises. But, by providing an alternative interpretive lens through which to view the decision, it does draw into focus some of the less obvious ways in which *Graham* fits within the constitutional landscape of sentencing. This Part explores three ways in which *Graham's* treatment of parole might broadly be seen as contributing to or heralding shifts in the future of constitutional sentencing regulation. Section III.A explains how *Graham* continues *Apprendi's* project of linking considerations of institutional design to punishment legitimacy by reallocating sentencing authority between institutional actors. Section III.B emphasizes how *Graham's* stretching out of the sentencing process breaks down traditional divides that separate front- from back-end sentencing and procedure from substance within sentencing, and broadens the substantive values that matter to sentencing itself. Finally, Section III.C suggests how *Graham's* approach to parole could lay the foundation for the increased importance of sentencing explanations as a means of allowing reviewing courts to police back-end sentencing without drawing any hard substantive lines.

(2006) (Souter, J., dissenting) ("[T]he death penalty must be reserved for the 'worst of the worst.'" (citing *Roper*, 543 U.S. at 568)).

¹⁵⁶ See Lee, *supra* note 50, at 678, 679 & n.6 (discussing "super due process for death" cases); *supra* note 122.

A. Linking Checks and Balances to Punishment Legitimacy

Graham's treatment of parole effectively extended the *Woodson/Lockett* individualization principle beyond the capital punishment context for the first time. But it also continued a more recent trend in the Court's sentencing jurisprudence of tying considerations of institutional design to punishment legitimacy. That trend began with *Apprendi v. New Jersey's* linkage of Sixth Amendment jury rights to substantive crime definitions.¹⁵⁷ *Ring v. Arizona* extended *Apprendi* to the sentencing phase in capital trials;¹⁵⁸ *Blakely v. Washington*¹⁵⁹ and *United States v. Booker* applied it to guidelines regimes.¹⁶⁰ *Graham* approached the institutional issue from the other end and from a different constitutional provision, linking the Eighth Amendment's protection against "cruel and unusual punishments"¹⁶¹ to a constitutional requirement of back-end sentencing review. Whereas *Apprendi* shifted authority from judges to juries at the front end of the process,¹⁶² *Graham* shifted authority from actors at the front end—be they legislatures, prosecutors, judges, or juries—to parole boards at the back end.

Notably, *Graham* never stated why, or even if, the second look it required must come from a parole board. This is a question worth asking. The Eighth Amendment's text, unlike that of the Sixth, leaves the issue wide open.¹⁶³ If the goal is more textured, individualized, and morally reliable sentences, one must ask why the parole board rather than some other potential back-end sentencer—a judge, jury, executive, even prosecutor—gets the final call.¹⁶⁴ Explicitly shifting back-

¹⁵⁷ See 530 U.S. 466, 476 (2000).

¹⁵⁸ 536 U.S. 584, 609 (2002).

¹⁵⁹ 542 U.S. 296, 303-05 (2004).

¹⁶⁰ 543 U.S. 220, 232 (2005).

¹⁶¹ U.S. CONST. amend. VIII.

¹⁶² At least, that is, in cases going to trial. In the over ninety percent of criminal cases that are resolved through plea bargaining, *Apprendi* still shifts power, but the shift is not from judges to juries, but from judges to prosecutors (and, to a lesser extent, legislatures). See Bibas, *supra*, note 7, at 465, 470-74.

¹⁶³ Compare U.S. CONST. amend. VI ("In all criminal prosecutions, the accused shall enjoy the right to a . . . trial, by an impartial jury . . ."), with *id.* amend. VIII ("Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.").

¹⁶⁴ See, e.g., Ball, *Normative Elements*, *supra* note 6, at 407-10 (arguing for an increased role for juries in parole decisionmaking); Berman, *supra* note 154, at 437-38 (proposing that prosecutors be more directly involved in parole board decisionmaking); Joanna M. Huang, Note, *Correcting Mandatory Injustice: Judicial Recommendation of Executive Clemency*,

end sentencing authority to any one of those bodies, of course, would have required substantial innovation. Parole avoids those difficulties, and *Graham* may well have seized upon parole mainly because it is the most established and regularized mechanism for back-end sentencing that currently exists.

Apprendi, however, suggests a potentially deeper motivation. *Apprendi*'s shift of power from judges to juries sought to further important separation of powers values by ensuring that juries could check prosecutors' and judges' punishment decisions.¹⁶⁵ Juries are well positioned to do so because of their ability to inject "contemporary community values" into punishment decisions.¹⁶⁶ As Justice Stevens—the author of the majority opinion in *Apprendi*—explained in *Spaziano v. Florida*, because juries "more accurately reflect the conscience of the community than can a single judge,"¹⁶⁷ they are especially suited to making the textured, granular, and fundamentally normative judgments that give punishment decisions their "moral and constitutional legitimacy."¹⁶⁸

Parole, at least in theory, performs a similar function. Like the jury in *Apprendi*, parole injects an additional check into the sentencing process by fragmenting authority among different institutional actors. It does so through an institution that historically has engaged in the textured, granular, and individualized inquiry that true sentencing reliability requires.¹⁶⁹ Relying on parole rather than, for instance, a

60 DUKE L.J. 131, 152-57 (2010) (arguing for an increased role for judges in correcting unduly harsh sentences through executive clemency).

¹⁶⁵ See, e.g., Stephanos Bibas, *Regulating the Plea-Bargaining Market: From Caveat Emptor to Consumer Protection*, 99 CALIF. L. REV. 1117, 1129 (2011) (observing that *Apprendi*'s vision of juries as a check on judges and prosecutors was one of "strict, static separation of powers"); Benjamin J. Priester, *Structuring Sentencing: Apprendi, the Offense of Conviction, and the Limited Role of Constitutional Law*, 79 IND. L.J. 863, 896-902 (2004) (explaining *Apprendi* by reference to the institutional balance of power established in constitutional criminal procedure).

¹⁶⁶ *Witherspoon v. Illinois*, 391 U.S. 510, 519 & n.15 (1968).

¹⁶⁷ 468 U.S. 447, 487 (1984) (Stevens, J., concurring in part and dissenting in part).

¹⁶⁸ *Id.* at 483; see also Appleman, *supra* note 6, at 1311-21 (reviewing the link between the jury's role as conscience of the community and punishment legitimacy in the *Apprendi* line of cases); Kyron Huigens, *The Dead End of Deterrence, and Beyond*, 41 WM. & MARY L. REV. 943, 1033-34 (2000) (noting the role of the jury in ensuring fine-grained moral judgments); Kyron Huigens, *On Commonplace Punishment Theory*, 2005 U. CHI. LEGAL F. 437, 454 (2005) (same); Jenia Iontcheva, *Jury Sentencing as Democratic Practice*, 89 VA. L. REV. 311, 382 (2003) (arguing that "[b]ecause of its ability to render individualized judgments and to reconcile conflicting views through deliberation rather than aggregation," the jury is best suited to making democratically and morally legitimate sentencing judgments).

¹⁶⁹ See *supra* notes 113-22 and accompanying text.

judge-focused mechanism yields a system in which no single institution wields too much power: legislatures make broad judgments about sentencing *ex ante*; prosecutors make judgments during charging and plea bargaining; judges make more textured, retrospective judgments during sentencing at T_1 ; and parole boards make further retrospective and individualized judgments during parole-board hearings at T_2 .¹⁷⁰ Parole boards ideally also reflect to at least some degree the conscience of the community, considering and filtering a range of input from affected community members and stakeholders.¹⁷¹ The resulting “moral and constitutional legitimacy” of the sentence flows both from the individualized, granular nature of the inquiry and the ultimate agreement among different institutional actors that comes out of the process by which punishment is imposed.¹⁷²

Whether this picture accurately reflects current realities is another matter. While it seems clear that the Court had some such vision of parole and juvenile sentencing in mind, some of its assumptions about parole seem idealistic, outdated, or naive. Many modern-day parole boards, for instance, see their job not as the individualized, character-driven inquiry into redemption that *Graham* envisioned, but as the expert, data-driven management of actuarial risk.¹⁷³ Instead of aiming to

¹⁷⁰ Cf. Berman, *supra* note 154, at 435-37 (connecting the disappearance of parole with a decline in checks and balances on sentencing).

¹⁷¹ See *supra* notes 17-21 and accompanying text; see also O’Hear, *supra* note 6, at 1279 n.174 (suggesting that parole boards may be at least as qualified as juries to act as “the conscience of the community”). But see Ball, *Normative Elements*, *supra* note 6, at 403-10 (arguing that parole boards do not have sufficient moral legitimacy to make the normative judgments inherent in parole release decisions).

¹⁷² *Spaziano v. Florida*, 468 U.S. 447, 483 (1984) (Stevens, J., concurring in part and dissenting in part). As this account suggests, *Apprendi*’s view of the purpose of the Sixth Amendment thus shares a deep commonality with *Woodson/Lockett*’s view of the Eighth Amendment in that both ultimately seek to ensure morally appropriate sentencing determinations. Justice Stevens and, more recently, Justice Breyer have implicitly recognized the connection, arguing that the Eighth Amendment requires jury sentencing in capital cases precisely because of the jury’s ability to help safeguard against the imposition of morally inappropriate sentences—the same feature that, according to *Apprendi*, animates the Sixth Amendment jury right. See *Ring v. Arizona*, 536 U.S. 584, 613-19 (2002) (Breyer, J., concurring in the judgment); *Harris v. Alabama*, 513 U.S. 504, 515-26 (1995) (Stevens, J., dissenting); *Spaziano*, 468 U.S. at 467-90 (Stevens, J., concurring in part and dissenting in part).

¹⁷³ See, e.g., Ball, *Normative Elements*, *supra* note 6, at 397-98 (discussing the role of risk in parole board decisionmaking); Stengel, *supra* note 20 (reviewing factors involved in making parole release decisions); Jeremy Travis, *Back-End Sentencing: A Practice in Search of a Rationale*, 74 SOC. RES. 631, 640 (2007) (suggesting that, in the modern era, parole decisions are primarily concerned with risk management).

do justice, they err on the side of denying release and protecting public safety.¹⁷⁴ The extent to which parole boards echo or embody the conscience of the community in making their decisions is also questionable. As David Ball notes, parole board commissioners are usually appointed by the governor, and released parolees who reoffend “are not good news for gubernatorial incumbents.”¹⁷⁵ *Graham* will—or at least should—force courts and policymakers to consider potential counterweights to these institutional pathologies. Potential solutions could include increased and more formalized roles for victims, offenders’ families, community members, and prosecutors; the advent and use of “parole juries”; and changes in methods of appointing, supervising, or incentivizing parole boards, such as requiring parole boards to recommend a specified number of prisoner releases every year or explicitly to consider the net costs of imprisonment versus release when making release decisions.¹⁷⁶ Such reforms would be in keeping with the spirit of the decision, even if not required by its letter.

B. *Breaking Down Sentencing Barriers*

By tying the availability of parole to the legitimacy of punishment, *Graham* also broke down traditional barriers within sentencing. The most obvious is the barrier between front- and back-end sentencing. Requiring multiple reviews during the process of sentencing means that sentencing is no longer a one-shot, static, unitary act. It is an extended process, premised on the notion that some offenders might

¹⁷⁴ See, e.g., Ball, *Normative Elements*, *supra* note 6, at 398 (noting parole boards’ incentives to avoid releasing prisoners); Alexandra Marks, *For Prisoners, It’s a Nearly No-Parole World*, CHRISTIAN SCI. MONITOR, July 10, 2001, at 1, available at 2001 WLNR 1261020 (surveying parole policies across time and states and describing the difficulty of countering political pressures against release).

¹⁷⁵ Ball, *Normative Elements*, *supra* note 6, at 398; see also Joan Petersilia, *When Prisoners Return to Communities: Political, Economic, and Social Consequences*, FED. PROBATION, June 2001, at 3, 7 (“In most states, the chair and all members of the parole board are appointed by the governor; in two-thirds of the states, there are no professional qualifications for parole board membership.”).

¹⁷⁶ For an expanded discussion of some of these possibilities, see Ball, *Normative Elements*, *supra* note 6, at 406-10. See also *id.* at 399-400 (proposing that parole boards consider net costs of imprisonment versus release); Berman, *supra* note 154, at 437 (suggesting that criminal justice officials be given quotas, forcing them to recommend at least a small number of prisoner releases every year); Douglas A. Berman, *A Truly (and Peculiarly) American “Revolution in Punishment Theory,”* 42 ARIZ. ST. L.J. 1113, 1120 (2010-2011) (discussing how parole juries could bring laypersons’ sense of justice to parole release decisions); Petersilia, *supra* note 175, at 7 (discussing the “need to rethink *who* should be responsible for making parole release decisions”).

outgrow or otherwise evolve out of their punishments and the original judgments that informed them. While we might be able to pass judgment on offenders with stable, well-formed characters, and to treat those *ex ante* judgments as presumptively reliable *ex post*, the same does not hold for juveniles and perhaps for others who have an inherent and pronounced capacity for change. Although the Court limited its holding to life sentences for juveniles who were not convicted of homicide, this logic could extend to juvenile life sentences for homicide and perhaps to other mandatory minimums for juvenile offenders as well.¹⁷⁷ *Graham's* treatment of sentencing as a more holistic, drawn-out process might also suggest more robust rights at the parole stage for access to counsel, more formal hearing procedures, and other protections that routinely attach to front-end sentencing, at least where punishments are sufficiently severe as to trigger *Graham's* strictures.¹⁷⁸

Graham also further blurred the boundary between procedural and substantive sentencing considerations, as well as the boundaries among different types of substantive considerations. The Court's coupling of procedural safeguards with substantive proportionality concerns underscored the artificiality of the substance-procedure divide in both sentencing and Eighth Amendment theory; as *Furman v. Georgia* and the Court's other early capital punishment cases made clear, the two cannot always easily be separated.¹⁷⁹ And while the Court's reliance on substantive proportionality law allowed it to expand existing doctrine only incrementally by hewing closely to *Roper* and *Atkins*, its use of the procedural, back-end remedy of parole also

¹⁷⁷ See Nilsen, *supra* note 4, at 69 (observing that all juvenile mandatory minimum sentences "do not afford any discretion to the sentencer based on individual characteristics of the offender," and so might violate *Graham*); see also Michael M. O'Hear, *Mandatory Minimums: Don't Give Up on the Court*, 2011 CARDOZO L. REV. DE NOVO 67, 71, http://www.cardozolawreview.com/Joomla1.5/content/denovo/OHEAR_2011_67.pdf ("*Graham* may also give grounds for juveniles (and perhaps others with deeply diminished culpability, such as the mentally retarded) to challenge lesser mandatory minimums."). The Court is currently considering two follow-on cases to *Graham* that present the question whether sentencing juveniles convicted of homicide offenses to life without parole violates the Eighth Amendment. See *Jackson v. Hobbs*, No. 10-9647 (U.S. argued Mar. 20, 2012); *Miller v. Alabama*, No. 10-9646 (U.S. argued Mar. 20, 2012).

¹⁷⁸ See LAFAYE ET AL., *supra* note 86, § 26.4 (detailing due process protections provided during the sentencing process); cf. Appleman, *supra* note 6, at 1368-69 (arguing that *Apprendi* should apply to parole release and revocation decisions); Ball, *Heinous, Atrocious, and Cruel*, *supra* note 6, at 961-68 (arguing that *Apprendi* should apply to parole release decisions in California).

¹⁷⁹ See *supra* notes 122, 155-56 and accompanying text.

allowed it to avoid confronting and drawing lines around difficult substantive questions. Is fifty years for juvenile nonhomicide too long? How much weight can or should parole boards give to retributive, rehabilitative, and incapacitative considerations? Should different considerations carry different weight at different points in the sentencing process, with, say, retribution receiving more weight up front?¹⁸⁰ What types of release opportunities—for example, compassionate release versus earned release—are necessary to satisfy *Graham's* mandate?¹⁸¹ The Court avoided these and similar questions, leaving it “for the State, in the first instance, to explore the means and mechanisms for compliance,”¹⁸² while setting the stage for further interventions down the road.¹⁸³

¹⁸⁰ Cf. Ball, *Normative Elements*, *supra* note 6, at 407-10 (proposing the parole jury as a mechanism to turn some of these normative questions over to the people).

¹⁸¹ See John A. Beck, *Compassionate Release from New York State Prisons: Why Are So Few Getting Out?*, 27 J.L. MED. & ETHICS 216, 227 (1999) (explaining the difference between compassionate and earned release and noting that, unlike earned release, “compassionate release is not a mechanism to reduce the sentence of inmates who have somehow paid their debt to society” and therefore “is justifiably viewed as a dispensation, rather than a right”). Some courts already have begun grappling with these issues, asking, for instance, whether compassionate release programs satisfy *Graham*. See *Bell v. Haws*, No. 09-3346, 2010 WL 3447218, at *9-11 (C.D. Cal. July 14, 2010) (holding that a sentence of fifty-four years to life that would have made a juvenile prisoner first eligible for parole at age sixty-nine complied with *Graham*), *vacated on other grounds sub. nom. Bell v. Lewis*, No. 10-56405, 2011 WL 6364713 (9th Cir. Dec. 20, 2011); *Angel v. Commonwealth*, 704 S.E.2d 386, 401-02 (Va. 2011) (holding that Virginia’s compassionate release statute, which allows for conditional release after a prisoner reaches the age of sixty-five, satisfies *Graham* by providing a “meaningful opportunity to obtain release”); cf. *People v. Mendez*, 114 Cal. Rptr. 3d 870, 881 (Ct. App. 2010) (holding that a sentence of eighty-four years to life imposed upon a juvenile violates *Graham* “because it amounts to a de facto sentence of life without parole”).

¹⁸² *Graham v. Florida*, 130 S. Ct. 2011, 2030 (2010).

¹⁸³ The Court has taken a similar approach before. *Atkins v. Virginia* prohibited execution of the mentally retarded while “leav[ing] to the State[s] the task of developing appropriate ways to enforce the constitutional restriction upon [their] execution of sentences.” 536 U.S. 304, 317 (2002) (second and third alteration in original) (quoting *Ford v. Wainwright*, 477 U.S. 399, 416-17 (1986)). *Panetti v. Quarterman* refined the prohibition on execution of the insane announced in *Ford v. Wainwright* and rejected as inadequate the lower court’s procedures for determining insanity. 551 U.S. 930, 952 (2007). But *Panetti* reserved judgment on “whether other procedures, such as the opportunity for discovery or for cross-examination of witnesses, would in some cases be required under the Due Process Clause.” *Id.* As Carol and Jordan Steiker observe, this gradualist approach to implementing the Eighth Amendment might lessen opposition to the Court’s interventions while still allowing it to refine and announce both substantive and procedural principles and to police outlier states for compliance. Carol S. Steiker & Jordan M. Steiker, *Atkins v. Virginia: Lessons from Substance and Procedure in the Constitutional Regulation of Punishment*, 57 DEPAUL L. REV. 721, 737-39 (2008); see also

At the same time, substantive considerations were not irrelevant. But by tying substantive considerations to the availability of parole, the Court embraced a broad, eclectic range of substantive values. Proportionality, as a doctrinal matter, no longer concerns only standard penological goals like deterrence and retribution. It also recognizes amorphous and softer values like “self-recognition of human worth and potential,” “renewal,” and “reconciliation with society.”¹⁸⁴ The Court’s acknowledgment that these concerns matter to punishment validity could encourage the creation of procedural spaces that foster forgiveness, reintegration, and healing as a legitimate part of criminal sentencing.¹⁸⁵ It may even be that, as *Graham*’s implications unfold, courts will explicitly consider and weigh these values in assessing both states’ compliance efforts in general and parole boards’ decisions in individual cases.

C. *Increasing the Importance of Sentencing Explanations*

Finally, *Graham*’s use of parole lays the foundation for the increased importance of sentencing explanations at the back end of the sentencing process. Despite the Court’s repeated reaffirmation of states’ discretionary powers over release decisions, and despite the intentional mushiness of its substantive guideposts, the Court made clear that the required second look must be “meaningful.”¹⁸⁶ The most natural way to enforce that command while still respecting states’ prerogatives would be for lower courts to insist on more robust back-end sentencing explanations, much as courts reviewing administrative agency decisions demand reasoned explanations but defer to an agency’s judgment regarding substance.¹⁸⁷ Parole, with its regularized, ad-

Steiker, *supra* note 36, at 299-301 (discussing institutional costs and benefits of procedural and substantive approaches to Eighth Amendment regulation).

¹⁸⁴ *Graham*, 130 S. Ct. at 2032.

¹⁸⁵ See Bibas & Bierschbach, *supra* note 55, at 130-45 (discussing mechanisms, such as victim-offender mediation, by which criminal law could promote expressions of remorse, apology, and reconciliation). The Court had hinted in the past that such values matter to the Eighth Amendment. See sources cited *supra* note 94.

¹⁸⁶ *Graham*, 130 S. Ct. at 2030.

¹⁸⁷ See *Motor Vehicle Mfrs. Ass’n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983) (holding that a court reviewing agency action under the arbitrary and capricious standard should ensure that the agency has considered relevant data, statutory factors, and important aspects of the problem, but should not “substitute its judgment for that of the agency”); RICHARD J. PIERCE, JR. ET AL., *ADMINISTRATIVE LAW AND PROCESS* § 7.5, at 407-13 (5th ed. 2009) (discussing review of agency reasoning).

ministrative processes, provides a comparatively good vehicle for that approach.¹⁸⁸ As Michael O'Hear points out, such explanation review is "methodologically distinct . . . from the sort of substantive review exemplified . . . by Eighth Amendment proportionality review," asking only whether sentencers have justified their decisions without going further to ask whether those decisions could be justified at all.¹⁸⁹

How much of an explanation courts should require, and the rigor with which they should scrutinize the explanations they do receive, will need to be worked out over time. Lower federal courts are currently grappling with similar issues in the front-end sentencing context in the wake of *Rita v. United States*, which established that within-Guidelines sentences in federal cases are presumptively reasonable, while leaving unsettled just how thoroughly those sentences must be explained under 18 U.S.C. § 3553(c).¹⁹⁰ Whatever the resolution of that issue, it seems clear that the effectively pro forma explanations now common in parole proceedings should no longer be enough to satisfy *Graham's* command. At a minimum, courts should insist upon assurances that parole boards have engaged in the individualized, granular determinations that *Graham* contemplated by considering and weighing evidence bearing on the offender's specific circumstances. While courts should not substitute their own substantive judgments for those of parole boards, they should police boards' decisions for arbitrariness and unreasonableness. This could mean, for example, requiring boards to identify the considerations that played the most important role in

¹⁸⁸ "Second-look" juries and executive clemency, by contrast, do not. The former might bump up against the tradition of jury secrecy; the latter might bump up against separation of powers concerns and the prerogative of the executive to grant clemency for virtually any reason, including reasons that have little to do with the individualized considerations that *Graham* had in mind.

¹⁸⁹ Michael M. O'Hear, *Appellate Review of Sentencing Explanations: Learning from the Wisconsin and Federal Experiences*, 93 MARQ. L. REV. 751, 752 (2009) (discussing appellate review of trial court sentencing determinations). As both O'Hear and scholars of administrative law recognize, "at the margins, explanation review can shade into substantive review, for an explanation cannot truly count as an explanation if some minimal standards of substantive rationality are not met." *Id.* at 752; see also PIERCE ET AL., *supra* note 187, § 7.6, at 417-20 (discussing differences between procedural and substantive review of agency decisionmaking, and noting that even procedural review can lead judges to take a position on the merits).

¹⁹⁰ 551 U.S. 338, 354 (2007); see also 18 U.S.C. § 3553(c) (2006) (requiring a sentencing judge, at the time of sentencing, to "state in open court the reasons for its imposition of the particular sentence"); *Rita*, 551 U.S. at 356 ("[W]e cannot read the statute as insisting upon a full opinion in every case."); Michael M. O'Hear, *Explaining Sentences*, 36 FLA. ST. U. L. REV. 459, 469 (2009) ("*Rita* effectively transformed a requirement for *explicit* explanation into a requirement for *implicit* explanation.").

their decision, to discuss how those considerations influenced the decision, and to respond to any significant arguments made by the offender or his lawyer.¹⁹¹ It could also mean that courts reviewing a long-serving offender's case might insist on increasingly stronger justifications for a refusal to release as time goes by, particularly where the offender had committed a nonviolent crime or where the victims, prosecutor, or community members either support or do not object to release. Before *Graham*, some courts reviewing parole denials already had taken tentative steps down this path.¹⁹² *Graham* will likely accelerate that development. Increased use of back-end sentencing explanations might eventually help to create a feedback loop between front- and back-end sentencers, further refining substantive proportionality norms and fleshing out the content and limits of concepts like restoration and reconciliation.¹⁹³

¹⁹¹ See O'Hear, *supra* note 189, at 752 (arguing for such requirements in the context of appellate review of front-end sentencing); cf. PIERCE ET AL., *supra* note 187, § 7.6, at 413-20 (describing similar requirements applicable to "hard look" review of agency decisionmaking); Richard A. Bierschbach & Stephanos Bibas, *Notice-and-Comment Sentencing*, 97 MINN. L. REV. (forthcoming 2012) (manuscript at 47-49) (on file with author) (arguing for application of similar requirements to sentencing and the charging and plea-bargaining decisions that influence it).

¹⁹² See *In re Lawrence*, 190 P.3d 535, 539 (Cal. 2008) (holding that where "evidence of the inmate's rehabilitation and suitability for parole . . . is overwhelming," the "immutable circumstance" of the original offense of conviction does not "inevitably support[] the ultimate decision that the inmate remains a threat to public safety" (emphasis omitted)); see also *Hayward v. Marshall*, 512 F.3d 536, 546-47 (9th Cir. 2008) (holding that the state governor's reliance on a "stale and static" factor in reversing the parole board's grant of parole violated due process), *vacated en banc*, 603 F.3d 546 (9th Cir. 2010); *Biggs v. Terhune*, 334 F.3d 910, 916-17 (9th Cir. 2003) (rejecting a habeas claim resulting from denial of parole, but stating that "continued reliance in the future on an unchanging factor" could ultimately "result in a due process violation"), *overruled by Hayward*, 603 F.3d 546; *Robles v. Dennison*, 745 F. Supp. 2d 244, 287 (W.D.N.Y. 2010) (finding parole board's repeated denial of parole based solely on the severity of the original crime without assessment of inmate's current parole risk to be arbitrary and capricious); *Gordon v. Alexander*, 592 F. Supp. 2d 644, 653 n.60 (S.D.N.Y. 2009) (granting plaintiffs leave to replead procedural due process claim if they could allege as a factual matter that parole appeals were "governed by an unofficial policy or practice that effectively eliminates the possibility of parole for prisoners serving indeterminate sentences based on 'stale and static factor[s]'" (alteration in original) (quoting *Hayward*, 512 F.3d at 546-47)).

¹⁹³ See Chanenson, *Guidance from Above*, *supra* note 6, at 189-94; Chanenson, *The Next Era*, *supra* note 6, at 381.

CONCLUSION

Graham recognized the significance of parole—and, implicitly, back-end sentencing generally—to the constitutional regulation of punishment. As I have tried to show in this Article, that significance cannot be understood solely in terms of substantive proportionality concepts like individual culpability and punishment severity. It also encompasses broader procedural and institutional concerns that aim at more granular, individualized, and reliable sentencing—concerns not just over what sentences are, but also over who sentences and how. If taken seriously, *Graham*'s view of parole could result in more textured, considered, and just sentences, ones that seek not only to deter and condemn but also to further restoration, reconciliation, and other soft but important values the Court saw as being bound up in parole.

But that is a big *if*. Just as a myopic focus on substance can obscure procedure, the reflexive use of procedure also can undermine substantive goals that procedure is supposed to serve. The Court's Eighth Amendment jurisprudence has a history of mixing the two in a way that is not always productive.¹⁹⁴ In the case of parole, a black box of individualization, without more, could do more harm than good, giving front-end sentencers an easy out, pushing discretion into an even more opaque body, and making it seem as if life without parole punishments for juveniles are largely off the table when in fact no one is released.¹⁹⁵ It is far too early to know whether the constitutional vision of parole suggested by *Graham* will be borne out. But appreciating the complexity of parole's relationship to the Eighth Amendment at least enables us to grapple more fully with the promises and pitfalls that lie ahead.

¹⁹⁴ See, e.g., Steiker & Steiker, *supra* note 183, at 725-30 (arguing that by deregulating the procedural means of enforcing *Atkins*'s prohibition on sentencing mentally retarded offenders to death, the Court has functionally impaired the prohibition itself); Steiker & Steiker, *supra* note 127, at 426-38 (arguing that the Court's procedural regulation of capital punishment has done little to enhance the reliability or fairness of the death penalty while at the same time giving the appearance of meaningful judicial oversight).

¹⁹⁵ Cf. Steiker & Steiker, *supra* note 183, at 733-34 (arguing that "the announcement of substantive rights that are undermined by ineffective procedures for implementing or enforcing those rights can be a particularly pernicious mode of constitutional regulation" because it can cause the public to "believe or be persuaded that this country's death penalty practices are less problematic than they really are").